LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 23 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

## No. 1142

**DONALD F. UNDERHILL,**

*Petitioner,*

VS.

**THE PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of Illinois.**

HOWARD T. SAVAGE,
33 N. Dearborn Street,
Chicago, Illinois 60602,
*Attorney for Petitioner.*

MIDWEST LAW PRINTING CO., 336 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3966

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Reference to Report of Opinion Below | 1 |
| Jurisdiction of this Court | 2 |
| The Questions Presented for Review | 2 |
| Constitutional Provisions, Statutes and Rules Involved in this Case | 3 |
| Statement of the Case | 6 |
| Argument of Reasons for Allowance of Writ | 19 |
| Appendix: | |
| Opinion of the Court Below | 1a |
| Indictment | 14a |
| Motion to Suppress Confession | 15a |
| Motion for New Trial | 17a |
| Jury's Verdict | 19a |
| Sentence | 21a |
| Report of Proceedings at Hearing of Motion to Suppress Confession | 22a |
| Pertinent Portions of Report of Proceeding at the Trial | 39a |

AUTHORITIES ARGUED

Elkins v. United States, 364 U.S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437 (1960) ..... 22
Harris v. South Carolina, 338 U.S. 68, 93 L. Ed. 1815 (1949) ..... 32
Lynumn v. Illinois, 372 U.S. 528, 83 S. Ct. 917 (1963) 31
Mallory v. United States, 354 U.S. 449, 1 L. ed. 2d 1479, 77 S. Ct. 1356 ..... 19-24
Mapp v. Ohio, 367 U.S. 643, 6 L. ed. 2d 1081, 1092, 81 S. Ct. 1684 ..... 22
McNabb v. United States, 318 U.S. 332, 87 L. ed. 819, 63 S. Ct. 608 ..... 20
Miranda v. Arizona, 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602 ..... 23, 29
People v. Hall, 110 N.E. 2d 249, 413 Ill. 615 (1953) ... 28
People v. Harper, 36 Illinois 2d 398, 223 N.E. 2d 841 .. 20
People v. Sammons, 161 N.E. 2d 322, 324; 17 Ill. 2d 316 (1959) ..... 28
People v. Stokes, 334 Ill. 200, 209 (1929) ..... 28
People v. Taylor, 211 N.E. 2d 673, 33 Ill. 2d 417 (1965) ..... 28
Rogers v. Richmond, 365 U.S. 534, 540, 5 L. ed. 2d 760, 766, 81 S. Ct. 735 ..... 30
Weeks v. United States, 232 U.S. 383, 58 L. ed. 652, 34 S. Ct. 341, L.R.A. 1915, B. 834, Ann. Cas. 1915 C. 1177 (1914) ..... 21

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

**No.**

**DONALD F. UNDERHILL,**

*Petitioner,*

vs.

**THE PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

## Petition For Writ Of Certiorari To The Supreme Court Of Illinois.

Petitioner, Donald F. Underhill, prays that a writ of certiorari issue to review a judgment against him of the Supreme Court of Illinois.

## REPORT OF OPINION BELOW.

The opinion of the Supreme Court of Illinois, of which review by this Court is sought, is officially reported in Volume 230, Northeastern Reporter, Second Series, West Publishing Company, St. Paul, Minnesota, at page 837 (230 N.E. 2d 837). The opinion as reported is included in the Appendix hereto at page 1a thereof.

## JURISDICTION OF THIS COURT.

The judgment sought to be reviewed was entered on September 29, 1967.

Defendant's petition for rehearing was denied on November 27, 1967.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28, Section 1257, United States Code Annotated. The pertinent provisions of the said Statute are as follows:

> Final judgments * * * rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is especially set up or claimed under the Constitution, * * * of, * * * the United States.

## THE QUESTIONS PRESENTED FOR REVIEW.

1. Whether the federal sanction of the *McNabb-Mallory* rule of exclusion of confessions obtained during unlawful detention of persons suspected of crime should, through the Fourteenth Amendment, be made applicable to State criminal prosecutions so as to safeguard the Fifth and Sixth Amendment rights, immunities and privileges of defendants in State criminal prosecutions.

2. Whether federal constitutional due process requires reversal of the judgment against petitioner because confessions used against him were obtained while defendant, and his co-confessor, co-defendant wife, were unlawfully detained by law enforcement officials.

3. Whether the confessions used against petitioner were involuntary, so as to vitiate the conviction as having been obtained in violation of and by denial of federal constitutional due process, without resort to the *McNabb-Mallory* exclusionary rule.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE.

Amendment XIV, Section 1., of the United States Constitution.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment V, of the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI, of the United States Constitution.

In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Chapter 38, Section 109-1, Illinois Revised Statutes 1965.

Person Arrested.

(a) A person arrested without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, and a charge shall be filed. A person arrested on a warrant shall be taken without unnecessary delay before the judge who issued the warrant or if he is absent or unable to act before the nearest or most accessible judge in the same county.

(b) The judge shall:

(1) Inform the defendant of the charge against him and shall provide him with a copy of the charge.

(2). Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code.

(3) Hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense; and

(4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code.

Rule 5 (a) of the Federal Rules of Criminal Procedure, Title 18 United States Code.

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Chapter 38, Section 19-1 Illinois Revised Statutes, 1965.

(a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in the Illinois Motor Vehicle Law, approved July 11, 1957, as amended, railroad car, or any part thereof, with intent to commit therein a felony or theft. This offense shall not include the offenses set out in Section 4-102 of the "Illinois Motor Vehicle Law", as heretofore or hereafter amended.

(b) Penalty.

A person convicted of burglary shall be imprisoned in the penitentiary for any indeterminate term with a minimum of not less than one year. As amended by act approved August 13, 1965. L. 1965, p. ....., H.B. No. 707.

## STATEMENT OF THE CASE.

Petitioner, Donald F. Underhill, was charged in an indictment returned to the Circuit Court of Kane County, Illinois by the February 1966 Kane County, Illinois Grand Jury, with the commission of the crime of burglary in violation of the Criminal Code of Illinois (R. 6, A. 14a).[1] Linda L. Underhill, wife of Donald, was charged in the same indictment with having aided or abetted her husband in the commission of the said burglary. Both petitioner and his wife pleaded not guilty (R. 90, A. 19a), and they were tried together before a jury that returned verdicts of guilty against both (R. 95, 98, A. 19a-20a). After the motion of the defendants for new trial was denied (R. 104, A. 21a), the Court sentenced petitioner, defendant Donald F. Underhill, to a term in the Illinois State Penitentiary of not less than two nor more than twelve years (R. 105, A. 21a).

Prior to the trial petitioner and his wife filed a written motion to suppress confessions allegedly made by them, in which they alleged that the confessions had not been voluntarily made (R. 14, A. 15a). Prior to the trial a hearing was had and testimony of witnesses was taken upon the motion to suppress the confessions (R. 119, A. 22a). At the hearing of the motion to suppress confessions the following facts were developed:

---

[1] R refers to page of trial court record used in the Supreme Court of Illinois, and A refers to page of the Appendix hereto.

Petitioner and his wife, who were residents of Elgin, Illinois, were travelling in an automobile on an Elgin Street just before 7 o'clock on the evening of January 16, 1966 at which time their automobile was stopped by two Elgin Police Officers. (R. 126-127, 134, 157, 166-169, A. 23a, 25a, 32a, 36a-37a). Petitioner's wife was driving the automobile and they were going to a hospital to see their sick baby (R. 128, A. 23a). The Police Officers told petitioner and his wife to come to the Police Station and she drove her car to the Police Station and they followed her. The two arresting Officers were Patrolman Lloyd and possibly Patrolman Volmer (R. 157, A. 32a).

At the Police Station, petitioner was locked in a cell (R. 134, A. 25a), and his wife was locked in a cell (R. 128, A. 23a). On the next morning, January 17, 1966, at about 10:30 (according to petitioner—R. 134, A. 25a), or at about 9:00 or 9:30 (according to Police Officer Stegle —R. 140, A. 27a), Police Officer Stegle took petitioner from his cell to the Detective Bureau in the Elgin Police Department, and had a conversation with him with respect to a burglary of the Manor Coffee Shop in Elgin (R. 140, A. 27a).

At this point the evidence becomes conflicting in material aspects. According to petitioner's wife, Officer Stegle took her from her cell on the day after the arrest into a room where Lt. Theis and Officer Jensen were present and Stegle asked her what she knew about some checks. Three hours later, about 2:00 P.M., they took her to the same room, same parties present, and Stegle said that they knew about the burglary and wanted her to tell about it (R. 128, A. 23a). Stegle threatened to charge her with adultery if she didn't give him the answers; told

her that he would let her go if she told him, would see that she got probation if she was found guilty, and asked her in return therefor to testify against her husband (R. 130-132, A. 24a-25a). She made no admissions or confession (R. 122, A. 22a). According to Officer Stegle when he saw petitioner's wife on the day after the arrest, it was shortly before noon and only Officer Jensen was present (R. 145, A. 29a). He did not threaten her "of committing adultery", did not tell her he would let her go if she answered questions, did not promise probation if she'd testify against petitioner. He asked her about the burglary, and though she at first denied it, when he told her petitioner had already told him about it, she told him that petitioner had told her to get a key, and that she had taken a key from the counter and given it to petitioner (R. 145-147, A. 29a). She told him that petitioner had made a duplicate key and that she placed the original key back on the counter. No promises or threats were made to or toward petitioner's wife and she did not request an attorney. There was no discussion between petitioner's wife and him about probation (R. 147, A. 29a).

Officer Jensen corroborated Officer Stegle's testimony that Lt. Theis was not present when petitioner's wife was questioned, and that there was no discussion with her concerning probation, her moral character or what would happen to her if she didn't talk (R. 154-155, A. 23a). He admitted that petitioner asked that his wife be kept out of it and that Stegle had replied that they would not keep her out of it but that they would not fight probation for her.

Lt Theis admitted seeing petitioner's wife in the station on the day after the arrest, but denied having talked to

her. To his knowledge, no promise of leniency was made to petitioner's wife (R. 162, A. 34a).

According to petitioner, he had been told by Officer Smith, when he was brought into the police station, about 7:00 P.M. on the night of the arrest, that he was charged with "driving without a driver's license" (R. 134, A. 25a). He was locked up. The next morning at 10:30, Lt. Stegle took him to the Detective Bureau room to talk. Officer Stegle, Officer Theis, and Officer Jensen were present when he was shown about 25 checks, and, when Stegle pointed and told him that he had found in his possession a key to the place from where the safe was missing. When petitioner denied any knowledge of the safe, Stegle told him that they could not convict him of anything, but that they could convict his wife of forgery. Stegle held up about 25 checks and told petitioner that if he would tell them about the burglary they would "let her go on this forgery" (R. 137, A. 26a). Lt. Theis came in and promised that petitioner's wife wouldn't be charged if he would tell him that he committed the burglary.

He had asked to make a phone call on the night of the arrest, but Lt. Smith had refused permission (R. 134, 138, A. 25a, 26a). He had had two conversations with the Detectives on the morning after the arrest—the first at 10:30 ending when he had refused to tell them. The second conversation was at about 10:50 A.M.

Officer Stegle testified that he had told petitioner that he thought that his wife had been involved in the Manor Coffee Shop burglary because he felt she had gotten the key while working there (R. 141, A. 27a). Petitioner told him that he would tell about the burglary if Stegle would keep his wife out of it. Stegle said he answered that he

was making no promises. Then Stegle said that later in the day petitioner talked with Lt. Theis and asked about probation for his wife and that Theis told him "The Police Department wouldn't object to probation for her, but we will go along with whatever the State's Attorney's Office recommends" (R. 142, A. 27a). Stegle denied that there was any conversation about sending petitioner's wife to a reformatory, or that they couldn't convict him of anything but could convict her of forgery. He admitted that petitioner had asked to make a phone call, but said it was on the morning after the arrest, and that petitioner had telephoned an attorney, but did not reach him (R. 143, A. 28a).

Officer Jensen corroborated the testimony of Officer Stegle as to the conversations with petitioner on the day after the arrest (R. 148-152, A. 30a-31a). He added that petitioner had admitted a part in the burglary during the conversation. He also said that Officer Stegle had told petitioner, when petitioner had asked them to keep his wife out of it, "we would not fight the probation for her, but we would not leave her out of the case" (R. 153, A. 31a-32a). He then said he believed Lt. Theis made that statement to petitioner (R. 154, A. 32a).

Officer Theis testified that the only conversation he had had with petitioner was on the afternoon of the day after the arrest, and that the conversation was in the presence of Officers Jensen or Stegle. He said that petitioner had asked to inform against someone about traffic in dope or pornographic matter, and to be allowed to leave the state with his wife. He had told petitioner that he could not make such a deal but would not oppose probation for the wife (R. 162-163, A. 34a-35a).

On the facts of the reason for the arrest of petitioner the following testimony was received:

LINDA UNDERHILL—The police picked them up as she was driving her husband in the car. They told her to come to the police station with them. She drove her car to the police station, and they followed her (R. 128, A. 23a).

DONALD UNDERHILL—At the station he was told by Officer Smith that he was charged with "driving without a driver's license". He was not served with any papers on that charge (R. 134, A. 25a).

OFFICER STEGLE—Petitioner was in the lockup the morning after the arrest because of driving a car without a driver's license and "also, we wanted to talk to him about some checks" (R. 143, A. 28a). He was actually charged with the crime of no operator's license (R. 143-144, A. 28a).

OFFICER JENSEN—He believed that petitioner was arrested for driving with "a revoked driver's license". He believed Officer Stegle had given orders to arrest petitioner for "attempted forgery at the Union Bank", and that this was the reason he was to be "picked up" (R. 158, A. 33a). Both petitioner and his wife were in custody on the day after the arrest (arrest January 16, 1966) because they were "picked up and charged with investigation, deceptive practices", and both were charged with that (R. 159, 164-165, A. 33a, 35a). He had seen the charge on petitioner's property envelope. Petitioner was originally under investigation for the checks and then information was given the officers that petitioner's wife had worked at a place that was burglarized and left the day after it

was burglarized, and the "safe being found" (R. 166, A. 36a).

Officer Smith—When brought in, petitioner "had no operator's license, but he was booked for investigation of deceptive practice also" (R. 168, A. 37a). Petitioner's wife was not charged with "no city vehicle tag" as appears on the back of our folder. She had been driving the car, and they were going to charge her with that (R. 169-170, A. 37a-38a). The Officer who stopped the car had seen petitioner driving and had seen him switch seats with his wife before the car stopped (R. 170-171, A. 38a). No complaint had been filed or warrant issued for the arrest of petitioner or his wife for deceptive practice, but Lt. Theis had alerted the Officers to look for them (R. 171, A. 38a).

At the trial the following facts were developed:

On Sunday morning, December 12, 1965, the owner of Manor Coffee Shop in Elgin, Illinois discovered that a gold-tinted safe was missing therefrom. He found no evidence of forcible entry into the shop (R. 190-194). Keys to the Coffee Shop had been entrusted to the owners and various employees, except that no key had been entrusted to Underhill's wife who was one of the employees (R. 195-201).

On January 11, 1966 some Elgin police officers found four parts of a small safe on the shoulder of a roadway (R. 210). The safe was the same color as the missing safe (R. 202). The officers took the safe into the Elgin Police Department (R. 211), and on February 17, 1966 they took the safe to the Illinois Crime Laboratory at Joliet, Illinois for examination (R. 212).

On January 16, 1966 at about 7:00 p.m. Donald Underhill's wife was driving him in an auto down an Elgin Street on the way to a hospital to visit their baby when an Elgin police squad car pulled up behind them with a red light on. His wife pulled over, and police from the squad car "got" Donald out of the car and asked his name (R. 345, 374). One of the police officers asked petitioner's wife for her driver's license, which she gave him; and the officer told her to follow him to the police station, which she did (R. 375). At the police station the officers took Donald Underhill and his wife into a room in which they searched her husband and seized all of his personal property. They took his wife's purse and they locked her in a cell (R. 377). Underhill was also locked in a cell (R. 346). At 9:30 the next morning two officers took petitioner's wife from her cell to an interrogation room (R. 379). At about 9:30 the next morning two officers took Underhill from his cell and asked him questions (R. 347).

In the presence of Officers Jensen and Theis, at 9:30 A.M. on February 17, 1966,[1] he had asked petitioner about the safe burglary at the Manor Coffee Shop, and had asked him to look at the safe. Petitioner denied knowledge of the burglary and he said he had never seen the safe before (R. 217). The officer told petitioner that he felt that his wife had obtained a key to the place while working there, and petitioner said he would tell everything if Stegle would keep his wife out. Stegle refused to promise. Petitioner thereupon said that he had asked his wife to get a key to Manor Coffee Shop, which she did; and that he had a duplicate of the key made at Elgin Lock and

---

[1] This is error. The officer obviously meant "January".

Key, and returned the original to his wife to return to the Coffee Shop (R. 217-218). Petitioner further told him that on December 12, 1965 at 3:00 A.M. he had driven an auto to the coffee shop, entered the rear door by use of the duplicate key, and had taken the safe to his home where he pried it open with a crowbar and two screwdrivers. He had removed $250 cash and other contents from the safe and dumped it on Spaulding Road. He had thrown the cash box into the river. He told Stegle that the duplicate key was among his personal property, and Stegle had brought his personal property envelope to him, from which petitioner had removed a key which he said was the duplicate key that he had used (R. 219-221). Petitioner agreed to give Stegle the crowbar and screwdrivers he had used. Stegle and Jensen drove petitioner to his home. Petitioner took them into his home, and down to his basement, where he showed them the floor where he had opened the safe. He handed them the crowbar (People's Exhibit 4) which he said he used (A. 222-225). Stegle and Jensen drove petitioner back to the police station and walked with him to a post office garage, where petitioner opened the trunk of his car which was stored there and removed two screwdrivers (People's Exhibits 5 and 6) which he said he had used to help open the safe. The crowbar and screwdrivers were taken to J. W. Nicol, Illinois Crime Laboratory, along with the safe on February 17, 1966, and returned to the Officers on May 6, 1966. On January 17, 1966, petitioner's wife told Stegle that petitioner had told her to get a key while she worked at the Coffee Shop. She had taken the key from the Counter and had given it to petitioner; and she had replaced it on the Counter after he had had a duplicate made (R. 226).

Officer Jensen substantially corroborated Officer Stegle's testimony about the contents of the confessions. He added that, when Stegle told petitioner that he suspected that petitioner's wife had had something to do with the burglary at the Manor Coffee Shop—she having possibly obtained the key—petitioner had offered to tell about the safe if they kept his wife out of it, and that they had said that they could not do that but that they would not oppose probation. Petitioner then confessed the burglary (R. 252-258, A. 39a-41a). Officer Jensen also testified the same as Stegle as to the confession of petitioner's wife (R. 259, A. 42a).

Both petitioner and his wife repudiated the confessions and denied the charge (R. 340 et seq, R. 369 et seq), and petitioner asserted an alibi defense (R. 340-344, 369-373). Their alibi was that on Saturday, December 11, 1965 petitioner's wife had worked from 7:00 a.m. to 2:00 p.m. at the Coffee Shop that was allegedly burglarized; that on the night of the alleged burglary, which had occurred sometime between 9:30 p.m. on December 11, 1965 (at which time employees had closed the shop (R. 324)), and 9:30 a.m. on December 12, 1965 (when the owner entered the store and discovered the safe missing), petitioner's wife had driven him in her father's vehicle to a wedding reception, where they had remained from 6:30 to 9:30 or 10:00 p.m.; from which reception they had driven to a friend's house, where they remained from 10:30 p.m. to 11:30 p.m.; from which house they had driven to his wife's father's home, where they arrived at about 12:30 a.m.; and that his step-father had thereupon driven them to their home, where they arrived at about 12:45 p.m. They had thereupon put their baby to bed, drunk some coffee and had gone to bed and remained there.

The verdict of the jury that Donald F. Underhill is guilty of burglary was returned and filed on May 11, 1966. On May 27, 1966, petitioner filed a written motion for new trial. (R. 64, A. 17a) In the said motion petitioner and his wife complained that the confessions used against them should have been excluded from evidence for the reason that the confessions were purportedly given when both were being held incommunicado and without charge in the City Jail of Elgin, Illinois, after both defendants had requested and been denied the right to contact legal counsel to represent them, while they were without counsel representing them during the in-custody interrogation that resulted in the alleged confessions, and where they had not been advised of their rights to advice of counsel and to remain silent, or any of their rights guaranteed by the Constitution of the United States or of the State of Illinois. On July 5, 1966 the Court held a hearing of the motion for new trial. (R. 531) The Court denied the motion. (R. 548-549)

On appeal to the Supreme Court of Illinois, the first three points argued in defendant's original brief are as follows:

1-A.

THE EXTRAJUDICIAL ORAL CONFESSION OF THE DEFENDANT WAS INVOLUNTARILY MADE AND WAS INCOMPETENT AND INADMISSIBLE AS EVIDENCE AGAINST HIM, AND THE TRIAL COURT'S RECEPTION OF SAID ALLEGED CONFESSION CONSTITUTED REVERSIBLE ERROR UNDER THE APPLICABLE STATUTES AND DECISIONS OF THE HIGH COURT OF ILLINOIS AND CONSTITUTED A USE OF EVIDENCE AGAINST DEFENDANT OBTAINED IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTION 10 OF THE ILLINOIS CONSTITUTION, AND ALSO DEPRIVES DEFENDANT OF DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

1-B.

BECAUSE IT BECAME APPARENT DURING THE TRIAL OF THIS CASE THAT THE CONFESSION OF DEFENDANT WAS ELICITED BY POLICE OFFICERS WHILE HE WAS HELD IN THEIR CUSTODY AND WHEN HE WAS THE SOLE SUSPECT AND WITHOUT ANY LEGAL COUNSEL TO REPRESENT HIM OR ADVISE HIM; AND THAT PRIOR TO AND DURING THE GIVING OF HIS CONFESSION HE WAS NOT ADVISED BY ANYONE OF HIS CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION, AND OF HIS RIGHT TO COUNSEL, THE COURT ERRED BY FAILING TO GRANT DEFENDANT'S MOTION FOR NEW TRIAL WHERE THESE MATTERS WERE SET FORTH AS ONE OF THE GROUNDS THEREFOR.

1-C.

**THE CONFESSION OF DEFENDANT'S WIFE, WHO WAS CO-DEFENDANT WITH HIM IN THE INDICTMENT, WAS NOT COMPETENT AS EVIDENCE AGAINST THE DEFENDANT FOR THE REASON THAT THE ALLEGED CONFESSION WAS MADE OUTSIDE THE PRESENCE OF THE DEFENDANT, THE FACTS ALLEGEDLY CONFESSED TO BY HER WERE NOT ONLY DENIED BY HER AT THE TIME OF TRIAL, BUT BY DEFENDANT AS WELL AND THE JURY WERE NOT INSTRUCTED THAT HER CONFESSION WAS COMPETENT AND ADMISSIBLE AS AGAINST HER ALONE, AND NOT AS AGAINST THE DEFENDANT. THE FAILURE TO INCLUDE IN HIS CHARGE TO THE JURY SUCH CAUTIONARY INSTRUCTION OF ITSELF CONSTITUTES REVERSIBLE ERROR EVEN IF BY SOME REASONING THE CONFESSION OF DEFENDANT'S WIFE CAN BE HELD TO HAVE OTHERWISE BEEN PROPERLY RECEIVED IN EVIDENCE AT THE TRIAL.**

At pages 33 to 37 of his main brief in the Illinois Supreme Court, petitioner argued that the confessions were inadmissible because they were obtained while he and his wife were being unlawfully detained, and where the police officers had not taken them before a judicial officer without unnecessary delay as required by Illinois Law. Petitioner also argued on those pages that the *McNabb-Mallory* exclusionary rule should be enforced against the States through the Fourteenth Amendment to the United States Constitution.

## ARGUMENT OF REASONS FOR ALLOWANCE OF THE WRIT.

### I.

**THE McNABB-MALLORY EXCLUSIONARY RULE, WHICH THIS HONORABLE COURT APPLIES IN FEDERAL CRIMINAL PROCEEDINGS AS A SANCTION TO ENFORCE RULE 5(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, SHOULD BE APPLIED AGAINST THE STATES THROUGH THE FOURTEENTH AMENDMENT IN THE SAME MANNER AND FOR THE SAME REASONS THAT THE FEDERAL EXCLUSIONARY DOCTRINE IN FOURTH AMENDMENT CASES WAS MADE APPLICABLE AGAINST THE STATES BY THIS COURT IN MAPP v. OHIO. ALSO, ONLY BY FORCING THE STATES TO EXCLUDE CONFESSIONS OBTAINED DURING ILLEGAL DETENTION, CAN THE SAFEGUARDS OF FIFTH AND SIXTH AMENDMENT RIGHTS WHICH ARE ENFORCED AGAINST THE STATES THROUGH THE FOURTEENTH AMENDMENT IN MIRANDA v. ARIZONA, BE MADE FULLY EFFECTIVE IN STATE CRIMINAL PROCEEDINGS.**

No question or dispute exists that the confession of petitioner, and the confession of his co-defendant wife, without which he could not have been accused of, much less than tried and convicted of the crime of burglary, were obtained, if at all, while they were being unlawfully detained in a police station by police officers in violation of an Illinois Statute that commanded that they be taken, without unnecessary delay, before the nearest and most accessible judicial officer in Kane County, Illinois. (see opinion of Illinois Supreme Court, A. 1a) The violated Illinois Statute (Chapter 38, Section 109-1, Illinois Revised Statutes 1965), is substantially the same as Rule 5(a) of the Federal Rules of Criminal Procedure (Title 18

United States Code), which Rule was involved in *McNabb* v. *United States,* 318 U.S. 332, 87 L. ed. 819, 63 S. Ct. 608, and in *Mallory* v. *United States,* 354 U.S. 449, 1 L. ed. 2d 1479, 77 S. Ct. 1356. Petitioner, in his main brief in the Supreme Court of Illinois, argued extensively that what has become known as the "*McNabb-Mallory* Rule" excluding confessions obtained during periods of unlawful detention, should be enforced against the states, thus to give effect to the fifth amendment privilege against self-incrimination by way of the due process clause of the Fourteenth Amendment. (Defendant's brief and argument, Illinois Supreme Court pp. 33-37.) The Illinois Supreme Court rejected this argument without any reference to the *McNabb-Mallory* Rule, or to the propriety or impropriety of its application in state prosecutions, and said merely the following:

> "The evidence at this hearing was contradictory. While the record does indicate that defendants were not promptly presented before a Magistrate as required by Section 109-1 of the Code of Criminal Procedure, such delay did not of itself vitiate the confessions but was merely a factor to be considered on the question of the voluntariness of the confessions. (*People* v. *Harper,* 36 Illinois 2d 398, 223 N.E. 2d 841)" (See opinion of Supreme Court of Illinois, A. 9a)

In *People* v. *Harper,* 36 Ill. 2d 398, 223 N.E. 2d 841 (1967), the Illinois Supreme Court had said, unequivocally, that it did not follow the *McNabb-Mallory* Rule that unnecessary delay in presentment before a Magistrate, *per se,* renders a confession inadmissible, and that the *McNabb-Mallory* Rule did not rest on constitutional principles, and that therefore it did not "of necessity apply to state criminal prosecution."

While true that the opinions of this Honorable Court in the *McNabb* and *Mallory* cases did not expressly rest the decisions that the confessions were inadmissible upon constitutional grounds, neither did this Honorable Court hold that federal constitutional provisions were inapplicable to the issue.

For many years after this Honorable Court had held that the Fourth Amendment barred the use of evidence secured through an illegal search and seizure in *federal* criminal prosecutions (*Weeks v. United States,* 232 U.S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R.A. 1915, B. 834, Ann. Cas. 1915 C. 1177 (1914)), the Court said nothing to cause the *Weeks* exclusionary rule to "of necessity apply to state prosecutions." Indeed the Court did, in *Wolf* v. *Colorado,* 338 U.S. 25, 93 L. ed. 1782, 69 S. Ct. 1359 (1949) refused to impose the *Weeks* exclusionary rule upon the states. Finally, the Court, in *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684 (1961), held that the *Weeks* exclusionary rule was enforceable against the states by way of the Fourteenth Amendment. The compelling reasons, quoted in the *Mallory* opinion from the *McNabb* opinion, for the exclusion of confessions taken from accused persons while they are unlawfully detained in violation of the provisions of Rule 5 (a) of the Federal Rules of Criminal Procedure, are as equally compelling to the safeguarding of Fourteenth Amendment due process rights of state criminal defendants. In fact, the purpose and calculated effect of the enforcement of the *McNabb-Mallory* exclusionary rule against the states is more clearly certain of accomplishment of the end of safeguarding the constitutional rights of state criminal defendants, than is the enforcement against the states of the *Weeks* exclusionary

rule relating to unlawfully obtained evidence. There has existed considerable doubt that the exclusion of evidence obtained in violation of the provisions of the Fourth Amendment is the best method to insure that Fourth Amendment rights will not be violated in state criminal proceedings.

> "There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine 'the criminal is to go free because the constable has blundered'. *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. ed. 2d 1081, 1092, 81 S. Ct. 1684, citing *People* v. *Defore,* 242 N.Y., at 21, 150 N.E. at 587.

This Honorable Court in *Mapp,* while recognizing that in some cases undoubtedly the criminal would go free because the constable blundered, considered judicial integrity, and the evil that might occur should the government become a lawbreaker and thus invite every man to become a law unto himself, to be a lesser evil and a lesser danger to ordered freedom as contemplated in the constitution. This Honorable Court, in *Mapp,* also rejected the argument that the adoption of the *Weeks* exclusionary rule would hamper the efforts of law enforcement bodies and render them ineffective. The Court, adopting language from its prior decision in *Elkins* v. *United States,* 364 U.S. 206, 4 L. ed. 2d 1669, 80 S. Ct. 1437 (1960), noted that the use of the *Weeks* exclusionary rule in the federal courts for half a century, had not rendered the Federal Bureau of Investigation ineffective, nor had it disrupted the administration of criminal justice in the federal jurisdiction. The Court also said that "The movement toward the rule of exclusion has been halting but seemingly inexorable." (367 U.S. 660, 6 L. ed. 2d 1093.) The enforcement of the *McNabb-Mallory* Rule would render many methods used

by many state law enforcement officials to obtain quick and involuntary confessions, futile, and, because of the very uselessness of such methods, would drastically reduce their employment, if not eradicate them.

In the case before the Court, the Illinois Supreme Court held that the fact that petitioner and his wife were interrogated without the benefits of the procedural safeguards of their constitutional rights set forth in *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, did not render their confessions inadmissible since defendant was tried before the date of the prospective application of the *Miranda* standards. The Court cited *Johnson* v. *New Jersey,* 384 U.S. 719, 16 L. ed. 2d 882, in support of that conclusion. However, is it not an anomaly that the *Miranda* standards, designed to safeguard the Fifth and Sixth Amendment constitutional rights of persons suspected of crime from denial by law enforcement officials, are enforced against the States by and through the due process clause of the Fourteenth Amendment, while the more important and effective safeguard of both of these Constitutional rights, which is accomplished by the *McNabb-Mallory* rule, is not enforced against the States in the same manner? Much of the safeguarding purpose of *Miranda* can be evaded by State law enforcement officials by the use of psychological coercion through the simple device of holding the accused in jail until he decides to waive his constitutional rights and privileges, and to confess so that he may be taken before a judicial officer and be promptly heard and tried, or be freed from restraint until he is tried and convicted. Should this Honorable Court withhold the enforcement of the *McNabb-Mallory* rule against the States, it will have diluted the good inten-

tions of *Miranda,* and will have rendered the *Miranda* standards far less effective in the safeguarding and preservation of the Fifth and Sixth Amendment constitutional rights of all persons in the 50 States. Had the police officers, in the case now being sought to be brought before the Court by this Petition, given petitioner advice of every right he possessed under the Fifth and Sixth Amendments, which they did not do, and had petitioner fully understood his rights, the prospect that he and his wife may have remained in jail for an undetermined period of time, away from their hospitalized baby, could be calculated to induce him to confess a crime which the officers had no evidence that he had committed, merely to secure his and his wife's, or merely his wife's release from jail. He and his wife had been thrown into a jail cell on Sunday night about 7:30 p.m., and on that Monday morning, January 17th, when they should have been taken before a Magistrate, who would have been duty-bound under the Illinois Statute to apprise them of their Constitutional rights and to consider and fix bail, they were taken into an interrogation room at the police station. At no time was an offer made to take them before a judicial officer, and at no time was there any indication by the police officers of when they intended to do so. According to the undisputed, uncontradicted testimony of defendant's wife, they were not taken before a judge until Wednesday, January 19, 3 days after their arrest. (R. 396)

## II.

**WHETHER OR NOT THE McNABB-MALLORY EXCLUSIONARY RULE, OR ITS SANCTION, IS MADE APPLICABLE TO THE PROCEEDINGS IN THIS CASE, THE CONFESSION OF DEFENDANT WAS INVOLUNTARY, AND THE USE OF HIS CONFESSION AND THE CONFESSION OF HIS WIFE AGAINST HIM CONSTITUTED A DENIAL OF DUE PROCESS.**

In the pretrial Motion to Suppress Confession (R. 14) it is alleged that petitioner was induced to make his confession by a promise made by one of the officers interrogating him, that in exchange for a confession, the police would not fight probation for petitioner's wife. Petitioner's wife, according to the motion, was induced to confess by promises of leniency and was coerced to confess by threats made by the interrogating officers, and by a promise that they would go easy on her and get her probation if she confessed. Also the motion alleged that petitioner's wife was told by the interrogating officers that they only wanted to put her husband behind bars and that they would see to it that she got probation if she talked. (R. 16, A. 15a-16a)

At the pretrial hearing of the Motion to Suppress the Confession it was not disputed and his wife was arrested and taken into the Elgin Police Station at about 7 o'clock on the evening of January 16, 1966, nor was it disputed that they were both locked in cells in the Police Station and kept there that entire evening without any formal charge and without bail; nor was it disputed that they did not communicate with anyone whomsoever until the morning of the next day, January 17, 1966; nor was it disputed that on that next day, January 17, 1966, neither petitioner nor his wife communicated with any person other than Elgin Police Officers. It was not disputed that

on that next day, January 17, 1966, the date of the alleged confessions of petitioner and his wife, that neither of them had been taken before a magistrate or other judicial officer, and that each was at various times during that day, taken into an interrogation room in the Elgin Police Station and subjected to questioning by police officers. Although a dispute exists between petitioner and his wife on one hand, and the interrogating Officers on the other, as to the details of the conversation between them during the interrogation, there is no dispute that Officers of the Elgin Police Department promised petitioner that if he would confess, the Elgin Police Department would not object to probation for petitioner's wife. (R. 142, 153, 161) No dispute exists that January 16th, the date of petitioner's arrest was Sunday, and that January 17, 1966, was Monday. Although there is some dispute among the Police Officers themselves as to the reason why the petitioner and his wife were arrested; there is no dispute at all in the record that they were not arrested for the burglary for which they were subsequently charged and convicted in this case. The charge of burglary came only after the interrogation and confession while petitioner and his wife were in custody on January 17, 1966.

Therefore, two important conclusions of fact bearing upon the question of the competency and admissibility of petitioner's confession are without dispute or contradiction—that is, (1) that petitioner and his wife were held incommunicado by the Elgin Police Officers for one entire night and one entire week-day, and more, without being taken before a Magistrate or other Judicial Officer, and (2) that petitioner's confession, if any such was made as testified by the Police Officers, came only after he and

his wife had been held in jail more than 14 hours, had been denied a prompt hearing by a Judicial Officer in violation of Illinois law, and had been taken from their cells and questioned at least twice during their unlawful detention; and only after petitioner had been promised by the interrogating officers, however cautiously, that, if he would confess, his wife would most probably receive probation, and where he had been threatened that, if he did not confess, she would very likely be imprisoned.

The Illinois Supreme Court agreed that the factors described above, bearing upon the question of the involuntary nature of the confessions admitted against petitioner, are present in the record. The Court, after stating that the police officer denied making any threats or promises of leniency as claimed by petitioner, observes that the police officers had testified with regard to their discussion with petitioner concerning probation for his wife, that they had "merely informed him that they would not oppose such probation while pointing out that it was not their prerogative to grant probation." (A. 9a) And the Court unequivocally states that the record indicated that the petitioners were not promptly presented before a Magistrate as required by Sec. 109-1 of the Illinois Code of Criminal Procedure. (A. 9a) The Court then expressly states that it would not disturb the Trial Court's finding of voluntariness of the confession on review because there was substantial evidence in the record to support the trial court's findings of voluntariness. The Court, however, did not delineate this substantial evidence in the record that supported the trial court's finding of voluntariness.

It has long been the rule in Illinois that a confession is involuntary and inadmissible if obtained by force and

brutality or by promises of leniency. *People* v. *Sammons,* 161 N.E. 2d 322, 324; 17 Ill. 2d 316 (1959). In 1929, the Illinois Supreme Court held that a trial court erred by admitting a defendant's confession where the same was obtained from her under a promise that it would inure to her benefit in her trial for the offense for which she was arrested, and was to be tried. *People* v. *Stokes,* 334 Ill. 200, 209 (1929). It is also the law in Illinois that, although the Illinois Supreme Court has rejected the *McNabb-Mallory* exclusionary rule, and its rationale, and has persistently rejected all argument that the admission of confessions obtained during periods of unlawful detention *per se* violates due process guaranteed by the Fourteenth Amendment to the United States Constitution, any delay in the bringing of a defendant before a Magistrate should be considered upon the question of whether or not any confession made by him during the course of the unlawful detention is voluntary. *People* v. *Hall,* 110 N.E. 2d 249, 413 Ill. 615 (1953); *People* v. *Taylor,* 211 N.E. 2d 673, 33 Ill. 2d 417 (1965); and the opinion in the present case. (A. 1a) The Illinois Supreme Court in the present case apparently construes coercion to confess to mean only the use of threats or physical brutality, or the promise of immunity or leniency that is within the power of the promisor to effect. In Petitioner's main brief before the Illinois Supreme Court, he argued that the coercion that rendered his confession involuntary was psychological. He and his wife had a small hospitalized baby. He and his wife, particularly his wife and another woman, were suspected by the police officers of forgery, and the police officers did in fact testify that they had orders to arrest petitioner and his wife for questioning about an alleged

forgery. His wife was detained in a jail cell as well as he. Neither he nor his wife were taken before a judge or other judicial officer on the next morning, but were taken into an interrogation room in the police station. He desired to protect his wife and to secure her release from jail and offered to tell about the burglary and give other information to the police if they would help her. The officers promised that they would not oppose probation for his wife. He had been convicted before, and had served time in penal institutions; and he felt that he had little chance of being found not guilty of the accusations for which he was detained, for this reason. (R. 368)

As stressed by this Honorable Court, in *Miranda* v. *Arizona,* 384 U.S. 436, 448, 16 L. ed. 2d 694, 708, 86 S. Ct. 1602, "the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, 'Since *Chambers* v. *Florida,* 309 U.S. 227, 84 L. ed. 716, 60 S. Ct. 472, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn* v. *Alabama,* 361 U.S. 199, 206, 4 L. ed. 2d 242, 247, 80 S. Ct. 274, (1960)." The petitioner refers this Honorable Court to the consideration of psychological coercion to confess as one of its own major reasons for the holding in *Miranda* that certain confessions, that had been obtained during in-custody interrogation in the absence of physical brutality, were nevertheless involuntary and constitutionally impermissible. (384 U.S. at page 448, et seq. 16 Law Ed. 2d at p. 709 et seq.) Almost six years prior to *Miranda* this Honorable Court held that, under the due process clause of the Fourteenth Amendment, "convictions following the admis-

sion into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand." *Rogers* v. *Richmond,* 365 U.S. 534, 540, 5 L. ed. 2d 760, 766, 81 S. Ct. 735. The Court in *Rogers* held that the inadmissibility of such confessions was not because they were unlikely to be true, but because the method used to extract them offended an underlying principle in the enforcement of criminal law, ours being an accusatorial and not an inquisitorial system. In *Rogers,* as in the present case, defendant was induced to confess during an unlawful detention in an office of a law enforcement official, and upon a belief that his wife's freedom was in jeopardy if he did not confess. In *Rogers* the defendant had been transported from a County jail, where he had been held pending trial, to the office of a State's Attorney, without any court order authorizing the transfer. During his interrogation there, a police chief had indicated that he was about to have the defendant's wife taken into custody. At that point, the defendant announced his willingness to confess, and he did confess. This Honorable Court reversed the conviction based upon the confession in *Rogers* because the lower Court had judged the voluntariness of the confession by an improper standard.

It is respectfully contended that the Illinois Supreme Court abandoned its duty and power to determine for itself whether or not the confessions used against Petitioner was coerced. The Court said:

> "The trial court determined these questions by a preliminary hearing and found the confessions were voluntary. On review such determination will not be disturbed unless manifestly against the weight of the evidence, or unless the court has committed an abuse

of discretion. (*People* v. *Ackerson*, 37 Ill. 2d 117, 224 N.E. 2d 849; *People* v. *Spencer*, 27 Ill. 2d 320, 189 N.E. 2d 270.)" (A. 8a)

The true question before the Court was not the balancing of credibility of State's witnesses against that of petitioner and his wife, with the unsupported conclusion that the trial court had correctly weighed the respective credibilities; it was, rather, upon taking all of the facts and circumstances about which there was no dispute or contradiction into consideration, was the trial court's conclusion correct that the confessions were voluntary. The Illinois high court was in no way bound by the trial court's conclusion of this question, and, of course, this Court is not so bound in considering and rendering a constitutional judgment.

In *Lynumn* v. *Illinois*, 372 U.S. 528, 83 S. Ct. 917 (1963), where a police officer expressly threatened the Defendant with loss of financial aid for infant children and loss of the children if she did not cooperate, this Honorable Court held the confession to have been coerced, and that the judgment against the Defendant was vitiated by use of the coerced confession because it violated the due process clause of the Fourteenth Amendment.

In the present case the threat to Petitioner's family, even if it had not been made in words uttered by the police officers, was actual, imminent and direct. Petitioner had no reason to confess the burglary other than to secure the release of his wife and to protect his child. His will was overborne at the time he confessed the commission of this burglary by all of the surrounding circumstances and the unlawful detention, and, in addition thereto, by

the promise of the police officers that they would not oppose probation for his wife. In *Harris* v. *South Carolina,* 338 U.S. 68, 93 L. Ed. 1815 (1949), in addition to protracted in-custody questioning, and the failure to provide counsel or to advise the arrestee of his constitutional rights, the Sheriff threatened to arrest petitioner's mother for handling stolen property, and petitioner replied: "Don't get my mother mixed up in it and I will tell you the truth." The trial court instructed the jury, in that case, that without the confession there was no evidence which would support a conviction, and that they should consider the confession only if they found it to be voluntary. The jury found the Defendant guilty. The South Carolina high court found the confession to be voluntary. This Honorable Court disagreed and reversed the judgment.

Since neither the Illinois Supreme Court nor the Trial Court set forth the standards by which they arrived at the conclusion that the confessions of petitioner and his wife were voluntary, this Honorable Court is asked to apply its own standards, and to reverse the conviction based upon these confessions.

References are made herein to confession of petitioner's wife as well as to that of petitioner, for the reason that her confession was received against the petitioner at the trial. Petitioner's trial counsel made no motion for a trial of petitioner separate from his wife, nor did he tender a cautionary instruction to the Court that her confession could be used only against her and not against petitioner, and the Court did not give such an instruction. On appeal, the Illinois Supreme Court held that it would not reverse the judgment of the trial court because of the improper use of the confession of petitioner's wife against

petitioner, because petitioner had not tendered an instruction to be given to the jury that her confession could not be used against him.

Respectfully submitted on behalf of Petitioner,

HOWARD T. SAVAGE,
*His Attorney,*
33 North Dearborn Street,
Chicago, Illinois 60602,
FInancial 6-6133.

# APPENDIX

230 N.E. 2d 837

The People of the State of Illinois,
Appellee,

v.

Donald F. Underhill, Appellant.

No. 40283.
Supreme Court of Illinois.
Sept. 29, 1967.
Rehearing Denied Nov. 27, 1967.

The Circuit Court of Kane County, John S. Peterson, J., found defendant guilty of burglary, and he appealed. The Supreme Court, Kluczynski, J., held that fact that defendant and his wife were not promptly presented before magistrate after their arrest did not itself vitiate their confessions at their joint trial but was merely factor to be considered on question of voluntariness of the confessions.

*Affirmed.*

1. *Criminal Law* — 1158(4)

Trial court determination as to admissibility of confession will not be disturbed unless manifestly against weight of evidence or unless court has committed abuse of discretion.

2. *Criminal Law* — 519(8)

Fact that defendant and his wife were not promptly presented before magistrate after their arrest did not of itself vitiate their confessions at their joint trial, but was merely factor to be considered on question of voluntariness of the confessions. S.H.A. ch. 38, § 109-1.

3. *Criminal Law* — 531(3)

Evidence supported finding that burglary confessions of husband and wife were voluntarily given.

4. *Courts* — 100(1)

Where defendant was tried for burglary before date of *Miranda* decision which is applied prospectively, and where fundamental fairness did not require application of Miranda standards, standards laid down in *Miranda* were not applicable to defendant's case.

5. *Criminal Law* — 404(1)

In view of fact that burglary confession of defendant was admissible, exhibits whose relevance was established by the confession were likewise admissible.

6. *Criminal Law* — 404(1)

Exhibit of keys, one of which would open back door of shop that was burglarized, was properly admitted for sake of comparison with second exhibit of key taken from person of defendant at time of his arrest and which defendant allegedly admitted using to gain entrance to the burglarized shop to establish if the key found on defendant could have opened door to shop on date of burglary.

7. *Criminal Law* — 1036(1)

Defendant could not on appeal challenge admissibility of confession without limiting instruction, where defense counsel was apprised of nature of co-defendant's confession at preliminary hearing on motion to suppress, and where at no time, including post-trial motion, was request made for separate trial or objection taken to admission of the confession.

8. *Criminal Law* — 1043(2)

Defendant must make timely objection to introduction of confession on specific ground or he is not in position to complain of his admission upon review of case.

*(Appendix)*

9. *Criminal Law* — 824(8)

Trial court does not have duty of instructing jury that confession, when admitted, may be considered only as against its author, unless co-defendant desiring such instruction requests it.

10. *Criminal Law* — 728(2)

Remarks of prosecutor not objected to by defendant are considered waived.

11. *Criminal Law* — 730(7, 13)

Improper closing remarks of prosecution suggesting that locks on burglarized shop had been changed subsequent to burglary and that defendant had committed, in addition to his two prior burglary convictions, "one other offense", did not constitute reversible error, where defendant's objections to both remarks were sustained and jury was instructed to disregard any statement not supported by the evidence, and where, with regard to second remark, record revealed that defendant himself on direct examination admitted prior arrest for assault, thereby vitiating impropriety of the second remark.

12. *Burglary* — 29, 41(4)

Unauthorized entry may be proved by circumstantial evidence, and accompanying intent to commit an offense may be inferred from fact that a larceny was actually committed. S.H.A. ch. 38, § 19-1.

13. *Criminal Law* — 535(2)

Voluntary confession may be considered along with other evidence to establish corpus delicti.

14. *Burglary* — 41(1, 2)

Evidence proved corpus delicti of burglary and also established defendant's criminal liability for the burglary beyond reasonable doubt. S.H.A. ch. 38, § 19-1.

*(Appendix)*

15. *Criminal Law* — 1159(3)

Supreme Court will not substitute its judgment for that of trier of facts where evidence is merely contradictory including situation where alibi is offered on behalf of accused.

16. *Criminal Law* — 1166½(1)

Failure of defendant's chosen counsel to exercise care and skill in trial of case generally does not afford basis for reversal of conviction.

17. *Criminal Law* — 641.13(8)

Failure of defendant's chosen counsel to suppress confession of co-defendant, to object to testimony of co-defendant and move to strike it, to ask for separate trial because of co-defendant's confession, to tender cautionary instruction to jury, and to object to certain remarks of prosecution in its final argument did not render defendant's representation so inadequate as to violate standards laid down for private counsel.

---

Starke, Anglin, Savage, Frazin, Stewart & May, Chicago (Howard T. Savage, Chicago, of counsel), for appellant.

William R. Ketcham, State's Atty., Elgin (W. Ben Morgan, Asst. State's Atty., of counsel), for appellee.

Kluczynski, Justice.

Defendant, Donald F. Underhill, was convicted of burglary in the circuit court of Kane County and sentenced to the penitentiary for a term of not less than 2 nor more than 12 years. He appeals from this conviction, contending that his confession was obtained by constitutionally impermissible means, that he was not proved guilty beyond a reasonable doubt, and that his counsel at trial was incompetent. He further contends that certain evidence and

exhibits were improperly admitted, that certain instructions were erroneously given, and that certain remarks in the State's closing argument were inflammatory and constituted reversible error.

The record discloses that a safe and its contents were taken some time between the evening of December 11 and about 9:30 A.M. December 12 from the locked premises of the Manor Coffee Shop in Elgin, where defendant's wife, Linda, was employed as a waitress. The three doors, windows and skylight of the shop bore no signs of forcible entry, and all keys to the premises were entrusted to persons other than defendant's wife. The day following the burglary Linda Underhill worked only two hours of her normal shift and left claiming illness and did not return to work thereafter.

On January 11, 1966, Elgin police officers found the remnants of what was once a safe on the shoulder of Spaulding Road, east of Griffin Road, in Cook County. On January 16, 1966, at about 7:00 P.M., defendant and his wife were picked up by Elgin police while driving a motor vehicle in the city of Elgin. They were taken to the police station, placed in separate cells, and booked for deceptive practices in connection with an investigation of some forgeries they were suspected of having committed. Defendant was also charged with driving without a license.

While incarcerated, defendant and his wife were separately questioned about the above burglary. On the morning of January 17, 1966, at about 9:30 or 10:30, defendant allegedly made an oral confession admitting his participation in the burglary, and his wife did likewise around 2:00 that afternoon. Thereafter, when defendant was asked to sign a written statement, he requested permission to call his attorney, which was granted. Upon being unable to reach his attorney defendant did not sign any statement.

*(Appendix)*

A preliminary hearing was held on March 29, 1966, and on April 4, 1966, defendant and his wife were indicted for burglary.

On May 9, 1966, defendant and his co-defendant wife, represented by private counsel, moved to suppress their oral confessions on the basis of involuntariness, charging that they were induced by promises of leniency and threats of other prosecutions against her. At the hearing on that motion the promises of leniency or threats were controverted by the interrogating police officers who did admit, however, to having a discussion with defendant concerning the possibility of probation for his wife, wherein they indicated they would not oppose such probation. But the officers emphatically denied promising defendant leniency for his wife, with regard to a prosecution for forgery, if he confessed to the burglary. Although defendant and his wife repudiated their confessions, the court denied their motion to suppress as to both confessions.

Defendant and his wife were tried jointly in a jury trial commencing May 10, 1966. The principal witnesses for the State were the police officers who testified that, among other things, defendant admitted burglarizing the coffee shop by use of a duplicate key obtained through his wife's assistance, opening the safe taken therefrom in his basement with a crowbar and screwdrivers, and dumping the dismantled safe out on Spaulding Road. They further testified that defendant's wife, outside defendant's presence, admitted abetting the burglary by taking the back door key of the shop, giving it to her husband, and returning it after he made a duplicate thereof. The officers at the trial, again denied making any promises of leniency regarding defendant's wife, stating that they only told defendant, in response to an inquiry by him, that they would not oppose probation for her. The State then introduced into evidence the fol-

lowing six exhibits: (1) two keys, one of which the owner of the Manor Coffee Shop testified opened the back door to his shop at the date of the burglary, (2) the key taken from the person of the defendant at the time of his arrest which he allegedly admitted using to gain entrance to the shop and which, when tested subsequent to the burglary, fit the lock on the back door but did not open it, (3) five pieces of metal, which once constituted a safe, and which defendant allegedly identified as the safe he removed from the coffee shop, and (4), (5) and (6) a crowbar and two screwdrivers taken, at defendant's direction, from his home and automobile, respectively, which he allegedly admitted were used to open the safe and which the prosecution's expert witness from the crime laboratory indicated could have been the tools used to dismantle the safe, and that paint pigment found on the crowbar was the same as paint pigment on the safe.

Defendant and his wife each took the stand in their own behalf and denied participating in the burglary, specifically repudiating their confessions, and introduced an alibi corroborated in part by defendant's stepfather. During defendant's direct testimony he admitted that he had twice before been convicted of burglary and had previously been arrested for assaulting his father-in-law.

The State's Attorney, in his closing argument, suggested that the reason exhibit (2) did not open the back door of the coffee shop was that the locks were changed after the burglary, although there was no direct evidence introduced at trial of any change of locks. (In his direct examination of the owner of the coffee shop, the State's Attorney sought to elicit information concerning a change in locks subsequent to the burglary, but defense counsel's objection to this line of inquiry was sustained by the trial court.) Defense counsel objected, and the court instructed the jury to disregard any remark unsupported by the evidence. The prosecution also argued that defend-

ant's previous convictions reflected on his credibility, and enumerated the two burglary convictions and referred to "* * * one other incident * * *" he did not recall at the time. Defendant's objection to the "other incident" without specification was sustained. Thereafter, defendants were found guilty of the crime charged, from which conviction he prosecutes this appeal.

In support of his contention that the above confessions should have been suppressed, defendant argues that they were obtained through coercion and inducement, as evidenced in part by the failure to bring him promptly before a judicial officer in accordance with section 109-1 of the Code of Criminal Procedure, (Ill. Rev. Stat. 1965, chap. 38, par. 109-1,) and that he and his wife were interrogated without the benefit of the procedural safeguards to their constitutional rights set forth in *Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S. Ct. 1717, 16 L. Ed. 2d 694.

[1] The trial court determined these questions by a preliminary hearing and found that the confessions were voluntary. On review such determination will not be disturbed unless manifestly against the weight of the evidence, or unless the court has committed an abuse of discretion. (*People* v. *Ackerson,* 37 Ill. 2d 117, 224 N.E. 2d 849; *People* v. *Spencer,* 27 Ill. 2d 320, 189 N.E. 2d 270.) At the preliminary hearing, defendant testified that he was held *incommunicado* for approximately 15 hours after his arrest and not allowed to call his lawyer, and that if he made any confession it was induced by the promise of leniency for his wife. Defendant's wife testified that she also was held *incommunicado* for about 15 hours after her arrest, and that the police threatened to prosecute her for adultery if she did not confess. Both defendants then repudiated that they had made confessions or admissions. The police officers in question denied making any threats or promises of leniency, and

stated, with regard to their discussion with defendant concerning probation for his wife, that they had merely informed him they would not oppose such probation while pointing out that it was not their prerogative to grant probation. They further stated that defendant was never denied the opportunity to call his lawyer and that he in fact was allowed to do so but that the attorney could not be reached.

[2-4] The evidence at this hearing was contradictory and while the record does indicate that the defendants were not promptly presented before a magistrate as required by section 109-1 of the Code of Criminal Procedure, such delay did not of itself vitiate the confessions but was merely a factor to be considered on the question of the voluntariness of the confessions. (*People* v. *Harper,* 36 Ill. 2d 398, 223 N.E. 2d 841.) There is substantial evidence in the record to support the trial court's finding of the voluntariness and we will not disturb it on review. We note that the standards laid down in *Miranda* are not applicable here since defendant was tried before the date of their prospective application, June 13, 1966 (*Johnson* v. *State of New Jersey,* 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882), and fundamental fairness does not require their application to this case. *People* v. *McGuire,* 35 Ill. 2d 219, 220 N.E. 2d 447.

[5, 6] Defendant's argument with respect to the admissibility of the State's exhibits is a corollary to his initial contention that his confession was inadmissible. Since we have decided that issue in favor of the confession's admissibility, it follows that the admission of exhibits (2) through (6) was proper since the confession establishes their relevance to this prosecution. It further follows that exhibit (1) was properly admitted for the sake of comparison with exhibit (2) to establish if the latter exhibit could have opened a door to the shop at the date of the burglary. Its admission was especially

necessary since the record indicates that perhaps the locks on the shop had been changed subsequent to the burglary and the trial court had improperly precluded the State from eliciting this information.

Defendant next maintains that "It is the law of this State that the voluntary confession of one person made after the commission of the crime cannot be admitted against a codefendant unless made in the presence of the codefendant and assented to by him," (*People* v. *Hodson,* 406 Ill. 328, 334, 94 N.E. 2d 166, 169) and that therefore it was error for the court to admit his wife's confession without giving a cautionary instruction to the jury that the confession should be considered only as to the wife's guilt.

[7-9] Defense counsel was apprised of the nature of the wife's confession at the preliminary hearing on the motion to suppress. At no time, including his post-trial motion, did he make a request for a separate trial or object to the admission of the wife's confession. Nor did he ask for or submit a cautionary instruction concerning the proper purpose of that confession. Therefore, defendant may not under the circumstances challenge the admissibility of the confession without a limiting instruction since, as held in *People* v. *Bartz,* 342 Ill. 56, 64, 173 N.E. 779, 782, "A defendant must make a timely objection to the introduction of a confession on a specific ground or he is not in a position to complain of its admission in evidence upon a review of the case. *People* v. *Robinson,* 308 Ill. 398, 139 N.E. 599; *People* v. *Bopp,* 285 Ill. 396, page 408, 120 N.E. 790; *McCann* v. *People,* 226 Ill. 562, 80 N.E. 1061; *O'Donnell* v. *People,* 224 Ill. 218, 79 N.E. 639, 8 Ann. Cas. 123. It is not the duty of the trial court to instruct the jury that a confession, when admitted, may be considered only as against its author, unless the codefendant desiring such an instruction, requests it."

[10, 11] Defendant also maintains that certain remarks of the prosecution in its final argument were inflammatory, that certain instructions were improper, and that both these remarks and instructions constitute reversible error. While, in his brief, defendant enumerates several allegedly improper statements, we need consider only those remarks objected to at trial since statements not objected to are waived. (*People* v. *Donald,* 29 Ill. 2d 283, 194 N.E. 2d 227.) As previously mentioned, those remarks were the prosecution's suggestion that the locks on the shop had been changed subsequent to the burglary, and its comment that defendant had committed, in addition to his two prior convictions for burglary, "one other offense". Defendant's objections to both remarks were sustained and the jury instructed to disregard any statement not supported by the evidence. Moreover, with regard to the latter remark, the record reveals that defendant himself, on direct examination, admitted his prior arrest for assault, thereby vitiating the impropriety of the remark. We therefore find that the court's admonishment was sufficient to correct any prejudicial effect produced by the prosecution's statements. We further find that defendant's contention with respect to certain instructions is spurious and that these instructions were properly given.

We next consider defendant's interrelated contentions that the State failed to prove the *corpus delicti* of the crime of burglary, since his confession is not competent evidence of same, and that he was not proved guilty beyond a reasonable doubt since his conviction was based solely on his and his wife's uncorroborated extra-judicial confessions.

[12-15] It was incumbent upon the State to show an unauthorized entry into the Manor Coffee Shop with the intent to commit a felony or theft therein. (See Ill. Rev. Stat. 1965, chap. 38, par. 19-1.) It is clear that the unauthorized entry may be proved by circumstantial evidence,

and that the accompanying intent to commit an offense may be inferred from the fact that a larceny was actually committed. (*People* v. *Franceschini,* 20 Ill. 2d 126, 169 N.E. 2d 244.) It is also clear, contrary to defendant's argument, that a voluntary confession may be considered along with other evidence to establish the *corpus delicti,* (*People* v. *Melquist,* 26 Ill. 2d 22, 185 N.E. 2d 825; *People* v. *Lueder,* 3 Ill. 2d 487, 121 N.E. 2d 743.) From an examination of all the evidence in the case, it is our judgment that the State not only proved the *corpus delicti* of the burglary but established defendant's criminal liability for the burglary beyond a reasonable doubt. The police testified concerning defendant's confession to the crime and the details he recited thereof. These details were corroborated by circumstantial evidence and the inference arising therefrom. For example, there was no sign that the coffee shop had been forcibly entered, thereby suggesting the use of a key. The safe and the tools defendant claimed he opened it with were found at the places indicated by him. Although defendant claimed an alibi, corroborated by his wife and stepfather, this was merely one fact before the jury. There was substantial competent evidence to sustain the jury's finding of guilty. We will not substitute our judgment for that of the trier of facts where the evidence is merely contradictory, including situations where an alibi is offered on behalf of the accused.

[16, 17] Finally, defendant complains that his counsel at trial was incompetent, thereby denying him his rights to counsel and due process of law guaranteed under the Federal and State constitutions. He particularly charges that the following series of omissions by trial counsel evidence an incompetent representation: the failure to suppress the confession of defendant's wife in that it was made outside defendant's presence, the failure to object to the testimony of his wife's confession and move to strike it, the failure to ask for a separate trial because

of his wife's confession, the failure to tender a cautionary instruction to the jury and the failure to object to certain remarks of the prosecution in its final argument. However, in this case the defendant is represented by counsel of his own choice and "the court has held, almost without exception, that the failure of such counsel to exercise care and skill in the trial case does not afford a basis for reversing a judgment of conviction." (*People* v. *Morris*, 3 Ill. 2d 437, 444, 121 N.E. 2d 810, 815.) From an examination of the record, we cannot say that defendant's representation was so inadequate as to violate the standards laid down for private counsel. Therefore, defendant must in this case bear the consequences of his chosen attorney's representation.

For the reasons stated above, the decision of the circuit court of Kane County is affirmed.

*Judgment affirmed.*

Page of Tr. Ct. Record

6 Indictment returned in the Circuit Court for the 16th Judicial Circuit, Kane County, Illinois, on April 4, 1966, in words and figures as follows:

The Grand Jurors, chosen, selected and sworn, on the first Monday of February, 1966, in and for the County of Kane, in the State of Illinois, in the name and by the authority of The People of the State of Illinois, upon their oaths present: that

Donald F. Underhill and Linda L. Underhill late of said County and State aforesaid, on, to-wit: the 12th day of December in the year of our Lord One Thousand Nine Hundred Sixty-Five at and within the said County of Kane, in the State of Illinois, aforesaid, committed the offense of Burglary in violation of Section 19-1 of Chapter 38 of the Illinois Revised Statutes in that

Donald F. Underhill, without authority, knowingly entered into a building at 555 North McLean Boulevard, the building of Roy Andresen, Leo Andresen, and Earl Handy, doing business as Andresen Brothers Co-Partners, which building is known as the Manor Coffee Shop in the City of Elgin, County of Kane and State of Illinois, with the intent to commit therein a theft or felony; and

Linda L. Underhill, committed the offense of Burglary in violation of Section 19-1, Chapter 38 of the Illinois Revised Statutes, in that she either before or during the commission of said burglary, and with the intent to promote or facilitate said burglary, solicited, aided or abetted Donald F. Underhill in the commission of said burglary, in that she unlawfully

obtained and delivered to said Donald F. Underhill a key to said premises, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

William R. Ketcham
State's Attorney in and for
said County of Kane

14 Motion filed by defendant May 9, 1966, after service of due notice in words and figures as follows:

MOTION TO SUPPRESS CONFESSION

Now comes the defendants, Donald F. Underhill, Linda L. Underhill and Phyllis L. Follman, and move this honorable Court to suppress the putative confessions allegedly made by each herein for the reasons that same were not made voluntarily and as grounds for said motion, state as follows:

1. That the following excerpts are taken from the transcript of testimony of officer David John Jensen of the Police Force of the City of Elgin, State of Illinois, given on the 29th day of March, 1966, at the preliminary hearing into the charges which are the subject of this indictment referring to the alleged confession of the defendant, Donald F. Underhill:

(Mr. McKenney:) Q. Officer Jensen, when you were questioning Donald Underhill did you make any promise of leniency toward his wife if he should agree to testify?

A. No, sir. The only thing I may put in here, he asked if we would keep her out of it and Sgt.

Stegle told him that we would not fight any probation for her but we would not leave her out of the case.

Q. This was right before he made the admission to you, is that correct?

A. I don't recall if it was in the middle, before, or after.

Q. Sgt. Stegle said they would not fight any probation for her if he would cooperate, was that his statement to the best of your memory?

A. I think he was questioning us, to give us the complete story if we could let her off, and we told him we couldn't do this. If she was to apply for probation that we would not fight it.

2. That before and during the making of the alleged confessions herein, by the defendants, Phyllis L. Follman and Linda L. Underhill, insulting remarks, promises of leniency and threats were made to both defendants to induce and coerce them into confessing to the crime for which they are indicted.

That examples of said remarks are as follows:

(a) Officers Stegle and Jensen told Mrs. Follman that they knew she was sleeping with defendant, Donald F. Underhill, and that if she did not talk they would inform said Donald F. Underhill's wife of said alleged relationship.

(b) Officers Stegle and Jensen told defendant, Phyllis L. Follman, that if she did not talk they would see to it that she served time and that things would go easy with her if she did talk.

(c) Officers Stegle and Jensen told defendant, Linda L. Underhill, that they would go easy on her and get her probation if she talked and that they

really just wanted to put her husband, defendant, Donald F. Underhill, behind bars, and that they would see to it that she got probation if she talked and that things would go very hard with her if she did not talk.

(d) Officers Stegle and Jensen told defendant, Donald F. Underhill, that they would put his wife behind bars if he did not talk.

/s/ Harold C. McKenney
Attorney for Defendants

Covey & McKenney
Attorneys at Law
88 Grant St.
Crystal Lake, Illinois
459-0832

64 Defendant's Motion for a new trial filed on May 27, 1966, after service of due notice in words and figures as follows:

1. That the Court improperly admitted into evidence the alleged oral confessions of the defendants, Donald F. Underhill and Linda L. Underhill, though objection was timely made by both defendants to the introduction of said alleged confessions by both defendants on the grounds:

(a) Said alleged confessions were purportedly given at a time when both defendants were being held incommunicado and without charge in the city jail of Elgin, Illinois, and after both defendants had requested and been denied the right to contact legal counsel to represent them, and were without counsel representing them while

they were being questioned and allegedly con-
65 fessing to the crime with which they are charged herein, and while they had not been advised of their rights to advice of counsel and to remain silent or any other of their rights guaranteed by the Constitution of the United States or of the State of Illinois.

2. Said confessions were admitted into evidence against both defendants before a corpus delecti of the crime itself was proven against either defendant.

3. Prosecution exhibits numbers one (1) through six (6) inclusive, were admitted into evidence improperly as no connection between said exhibits and either of the defendants was shown during the trial, nor were prosecution exhibits five and six (5) and (6), shown to be relevant to any issue concerning said trial, all over objections properly made by defendants.

4. The closing argument of the prosecution was improper and prejudicial to the defendants in that it did not relate to the evidence adduced during the trial, and contained spurious, degrading and derogatory references and remarks about the defendants which were inflammatory in nature and tended to improperly influence the jury against the defendants and their characters, which had not been put into issue during said trial.

5. That the evidence adduced by the state from the testimony of the witnesses it produced was conflicting and contradictory and insufficient to support a verdict of guilty as charged in the indictment.

/s/ Harold C. McKenney
Attorney for Defendants

90 Order for issuance of Capias against Donald F. Underhill and Linda L. Underhill and fixing bail at $5,000.00 each.

Arraignment of Donald Underhill and Linda Underhill on April 7, 1966, notation is made that a copy of the indictment together with a list of witnesses was served upon them and their attorney and that each upon arraignment say for their plea that they and each of them are not guilty of the crime of burglary in manner and form as charged in the indictment, further that the cause be continued to May 9, 1966, and remanding defendant Linda Underhill to the custody of the Sheriff of Kane County.

93 Order continuing the bail of Donald Underhill in the amount of $6,500.00.

94 Order entered May 9, 1966, denying defendant's motion to suppress confession.

95 Trial begins, jurors are selected to try the case, and the cause is adjourned to May 11, 1966.

97 Trial continued on May 11, 1966, testimony of witnesses heard, arguments of counsel made, defendant's motion for finding of guilty at the close of all evidence made and denied, jury instructed and retires to consider verdicts.

98 Jury's verdicts returned in words and figures as follows:

> "We, the jury, find the defendant, Donald F. Underhill, guilty of Burglary, and we further find from the evidence that the said defendant,

Donald F. Underhill, is now about the age of 28 years."

and

"We, the jury, find the defendant, Linda L. Underhill, guilty of Burglary, and we further find from the evidence, that the said defendant, Linda L. Underhill, is now about the age of 29 years."

Both Defendants are thereupon remanded to the custody of the Sheriff of Kane County and the date of hearing of post trial motions is set for May 19, 1966.

99 Order June 1, 1966, continuing hearing for post trial motions.

100 Further Order June 13, 1966, continuing hearing of post trial motions to July 11, 1966.

101 Order July 5, 1966, noting the entry by each of the defendants of their post trial motion for a new trial, and that the court heard the arguments of counsel and being fully advised in the premises denied the motion as to each of the defendants. Further order that leave is granted to Harold C. McKenney, defendant's attorney to withdraw as their attorney and the Court thereupon appointed Lester James Galvin and Ernest R. Akemann Public Defenders to represent the defendants. Notation made that defendant, Linda L. Underhill, thereupon moved for leave to be released from probation, and the cause was continued until July 11, 1966, for the report of a probation

officer, as to defendant Linda L. Underhill, and both defendants are remanded to the custody of the Sheriff of Cook County.

104 Order dated July 5, 1966, in words and figures as follows:

This cause coming on to be heard on the Motion of Defendants herein, by their attorney, Harold C. McKenney, for a new trial, and the Court having heard the argument of counsel and being fully advised in the premises,

It Is Hereby Ordered That the Motion for a new trial is denied.

It Is Further Ordered That leave be given to defendant, Linda L. Underhill, to file her Petition for Probation herein,

It Is Further Ordered That leave be given to defendant, Linda L. Underhill, to file her Petition for Probation herein,

It Is Further Ordered That leave be given attorney Harold C. McKenney to withdraw his appearance as attorney of record herein for Donald F. Underhill. Dated July 5, 1966

Enter: /s/ John S. Petersen
Judge
Book 287 Page 0900

105 Hearing had in aggravation and mitigation of the offense on July 11, 1966, and defendant Donald F. Underhill sentenced to the Illinois State Penitentiary for a crime of Burglary for a term of not less than 2 years nor more than 12 years.

*(Appendix)*

119 Report Of Proceedings At The Hearing Of The Cause On May 9, 1966. Mr. Barry E. Puklin, Assistant State's Attorney, Appeared For The People. Mr. Harold C. McKenney Appeared For The Defendants.

121 It was agreed between Court and counsel that the cause the State would proceed upon would be the charge of Burglary against Linda and Donald Underhill.

122 "The Court: Has your wife been in jail all this time?

Donald Underhill: We haven't been able to renew a bond because the house wasn't paid for.

The Court: What is your motion?

Mr. McKenney: Motion to suppress the confession, Your Honor, based upon the involuntariness. It sets out facts evidencing promises of leniency and certain threats.

The Court: Well, I guess we better wait until she gets here.

Mr. McKenney: I suppose so.

The Court: (To Clerk) Tell him to bring that gal in here.

I guess you have got the laboring oar."

Defense counsel argued that the motion spoke for itself and he asked that the Court inquire as to the truth of the State's denial.

125 Defense counsel asked that Linda Underhill be sworn.

*(Appendix)*

126 LINDA L. UNDERHILL, one of the defendants in the cause, being first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. McKenney.*

I live at 652 Logan Avenue, in Elgin, Illinois, and I am the person who is charged with the crime of Burglary in this matter. Two police officers whose names I don't know took me to jail on January the 16th, of this year and they threw us in jail. They did not take me out of my cell until the following mid-morning. They did not tell me that I was under arrest. I was not charged officially with anything, and they did not hand me any papers saying I was charged with anything.

128 They just locked me up. I was driving on the street on the way to the hospital to see our baby, and they picked us up and said to come to the Police Station with them. I drove my car to the Police Station and they followed me. Sgt. Stegle took me from my cell the next day. No one was with him when he took me. When I got into the room there were two other detectives there; one was Lt. Theis and the other was Officer Jensen. The officers did most of the talking. Sgt. Stegle asked me what I knew about some checks. He never mentioned the burglary at that time. About three hours later in the Detective Bureau the same police officers talked with me about the burglary. Sgt. Stegle said that they knew about the burglary and they wanted me to tell about it.

He told me that if I didn't give him the answers he wanted he was going to charge me with adultery. He told me he would let me go if I told him. He told me that if I was found guilty he'd see to it that I got probation; in return for the probation he asked me to testify against my husband.

*Cross Examination by Mr. Puklin.*

I think Officer Siete was present part of the time with officers Lt. Theis, Sgt. Stegle and Officer Jensen. He was behind me. Donald Underhill was not in the room when this took place. Donald was in the car with me when I was picked up. They put him in the squad car and I drove our car. They did not tell me why we were being arrested. They took my driver's license and told me to follow them. I was in my car alone when we drove to the station. It was on a Monday around 2:00 P. M. that Lt. Theis said he'd let me go. They had talked to me previous to this, and he said, just as long as I wouldn't tell them what they wanted, to get back into my cell.

Q. On the first occasion when they talked to you, wasn't that when you told them what part you took in the burglary?

A. No, I didn't tell them anything.

Q. At any time did you ever tell them anything?

A. No.

I never told them I took part in the burglary. I never made a confession. I did not make any admissions.

*(Appendix)*

133 DONALD F. UNDERHILL, one of the Defendants, being first duly sworn, was examined and testified as follows;

134 *Direct Examination by Mr. McKenney.*

I am the husband of defendant, Linda Underhill, and I am charged with the crime of burglary herein. I arrived at the Police Station at the same time as my wife did. I asked for a telephone call from Lieutenant Smith, and he refused me. He refused to let me make a telephone call. I asked him what I was charged with, and he told me "driving without a driver's license". I was not served with any papers for driving without a driver's license. They locked me up. I had arrived at the Elgin Police Station about 7 o'clock that night and I remained in the Cell until 10:30 the next morning. I didn't see anybody from the time they locked me up until 10:30 the next morning. At 10:30 Lt. Stegle came and got me, and I asked him if I could see my wife, and he said, "After we talk." Officer Jensen was with him when he took
136 me out of my cell. We went to the Detective Bureau Room. I think Sib Siete was in and out of the room during the conversation. Siete did not take part in the conversation. At first it was just Sgt. Stegle and Officer Jensen who took part in the conversation, and when I would not tell them anything Lt. Theis came in. They showed me what must have been twenty five checks, and Sgt. Stegle pointed at a safe behind me and told me he wanted to know about that, and I told him that I did not know anything about it. He told me he found a key to the business where

the safe was at in my possession. I still wouldn't tell him anything so he told me we can't convict you of anything, but we can convict your wife of this forgery. And he held up the bunch of checks, and he said "now, if you tell us about this burglary, we will let her go on this forgery." And then Lt. Theis came in and he promised me that she wouldn't be charged at all if I'd tell him I did the burglary.

138 I kept asking him if he really would. And he said I can take the blame for everything, the checks and the burglary. And if I didn't, then he'd have to let me go but they would send her to Dwight. And if I did, nobody but me could go to jail.

*Cross Examination by Mr. Puklin.*

My wife and Phyllis Follman were not present at this time. They would not let me communicate with my wife at all. It was about twenty minutes after seven on Sunday night when I asked Lieut. Smith to make a telephone call. I had two conversations with the detectives on the 17th. The first time they asked me about it, and I would not tell them they put me back in my cell. That was about 10:30. Around ten minutes to eleven they brought me out again.

139 THOMAS STEGLE, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

140 *Direct Examination by Mr. Puklin.*

I am a Police Officer, and I am acquainted with Donald Underhill, and his wife, Linda Underhill. I

had occasion to see Donald Underhill in the Detective Bureau of the Elgin Police Department about 9 or 9:30 A. M. on January 17, 1966. The persons present at that time were Officer David Jensen, Donald Underhill and I, and Lieut. Theis was in and out. Lieut. Theis took no part in the conversation. I had a conversation with Donald Underhill in regard to a burglary which took place in the Manor Coffee Shop in Elgin. During this conversation nobody in my presence made any offers of leniency or promises of probation.

141 Q. Was there any conversation at all about probation?

A. When I first started talking to Donald, I told him that I felt that his wife was involved as I felt that she had gotten the key while working there. And at this time he says, "I'll tell you all about it if you keep her out of it." And I said I'm not making any promises. And then later on when Lt. Theis was talking to Donald Underhill, that was later in the day, Donald asked about probation for Linda.

142 Lt. Theis told him—he said, well, "The Police Department wouldn't object to probation for her, but we will go along with whatever the State's Attorney's Office recommends."

Nobody in my presence promised to let Linda go free if Donald would plead guilty to the burglary and forgery. There was no conversation in my presence about her being sent to Dwight Reformatory. I did not state to Donald Underhill, and nobody stated to him, that they couldn't convict him of anything, and they could convict her of forgery. The first time I

saw Donald Underhill was on January 17th in the
143 lockup of the Elgin Police Department. I took him out of the lockup. He did not ask to make any phone calls at that time.

Q. Did he ever ask to make a phone call?

A. Yes, after we talked about the burglary. He was asked if he'd give a written statement and he said he'd like to contact his attorney first. And he was allowed to use the telephone at that time. And he tried to call John McNerney, but Mr. McNerney wasn't in. I did not make any threats that I would get to Linda Underhill if he did not cooperate with me.

Q. Do you know how it happened that Donald Underhill was in the lockup that evening?

A. That morning?

Q. That morning.

A. He was—he was in on a traffic violation. I believe it was no operator's license. And, also, we wanted to talk to him about some checks.

Q. Do you know if he had been ticketed for driving with no operator's license?

A. Well, he was in the lockup. It was for no operator's license. I'm pretty sure on that.

144 *Cross Examination by Mr. McKenney.*

To the best of my recollection, Donald Underhill was actually charged with the crime of no operator's license.

The Court: Q. He was, or he was not?

The Witness: He was.

The Court: Thank you.

By Mr. McKenney: Q. Do you know that for a fact, sergeant?

The Witness: A. No, I don't.

Q. All right.

A. I know he was in for a traffic violation. I wasn't there when he was picked up for the traffic violation; all I know is what the report read.

145 *Redirect Examination by Mr. Puklin.*

On this day I had occasion to see Linda Underhill in the detective bureau of the Elgin Police Department. Officer Dave Jensen was present with me at that time. This was shortly before noon. I did not threaten her "of committing adultery". I did not tell her that I'd let her go if she'd answer the questions that I was going to ask her. I did not promise her that she'd get probation if she'd help me in testifying against her husband. I talked to her reference burglary at the Manor Coffee Shop and asked her what blary at the Manor Coffee Shop and asked her what part she played in it. She at first denied it.

147 I told her I'd already talked to Donald and that he had told me about it. She then told me that she was working there prior to the burglary and Donald had told her to get a key, and that he more or less threatened her, and that she knew that she had better get a key. She took the key from the counter and took it and gave it to Donald. He had one made and she took the key and placed it back on the counter. No promises were made. No threats were made, she did not request to call an attorney. I don't believe there was any discussion between Linda and me relative to probation.

*(Appendix)*

148 DAVID JOHN JENSEN, called as a witness on behalf of the People, being first duly sworn, testified as follows:

*Direct Examination by Mr. Puklin.*

I'm a detective for the Elgin Police Department and am acquainted with Linda and Donald Underhill whom I saw on the 17th day of January, 1966, at the Detective Bureau of the Department. The time was around 9 or 9:30. Sgt. Stegle, Donald Underhill and I were present. Lt. Theis, I think came in on two occasions. Lt. Theis took no part in the questioning. I had a conversation with Donald Underhill relative to the burglary at the Manor House Coffee Shop in Elgin. In my presence Office Stegle did not state to Donald Underhill that they couldn't convict him of anything, but that they could convict his wife of forgery. There was no conversation relative to the fact that if he would plead guilty to the burglary and forgery they'd give probation to his wife.

150 Q. Were there any—was there any discussion of probation at all?

A. Yes, sir.

Q. Would you please tell the Court what discussion there was?

A. I think Lt. Theis was in the Detective Bureau at the time when Donald asked this of Sgt. Stegle and myself, if we could get probation for his wife. And Lt. Theis answered him that we couldn't assure any probation. We could not fight it. We'd go along with the State's Attorney's recommendation.

*(Appendix)*

During the conversation Donald Underhill admitted a part in the burglary. He was not given any promise of leniency and no deals were made for what he would say at this time. I had occasion to see Linda Underhill on this date just prior to Lunch on this same day. It was about 11:30 in the morning. Officer Stegle was present with me in the Detective Bureau of the Police Station. No one in my presence at this time accused Linda Underhill of adultery. No one told her they would let her go if she testified against her husband, Donald. She admitted a part in the burglary at this time. There was no discussion with her at all with regard to probation.

152 *Cross Examination by Mr. McKenney.*

I believe Lt. Theis was in there when Donald asked Sgt. Stegle about probation. I do recall that Lt. Theis did have a conversation with him concerning probation.

153 In other words, it was a three-way conversation. Lt. Theis walked in at that time and he made his admission and Sgt. Stegle was there. They may have both talked of this. I recall being in Court on March 29, 1966, before Judge Krause at a preliminary hearing concerning this matter, and I recall giving testimony at that time. I recall being asked the following questions and having given the following answers:

Q. "Officer Jensen, when you were Donald Underhill, did you make any promise of leniency toward his wife if he should agree to testify?

A. No, sir. The only thing I may put in here,

he asked if we would keep her out of it and Sgt. Stegle told him that we would not fight the probation for her, but we would not leave her out of the case."

154 That answer was correct when I gave it, and is correct now. I do think it was Lieut. Theis who said that, but Sgt. Stegle was there. It may have been
155 Sgt. Stegle who made that statement. Lieut. Theis was not present during the questioning of Linda Underhill. I believe I was in the room at all times. There was no discussion with Linda Underhill concerning probation or her moral character, nor was there any discussion concerning what would happen to her if she didn't talk; and there was no discussion concerning her going to Dwight or to prison. I don't believe that Lt. Theis questioned Donald as to the burglary or its events. I think he overheard some of it by coming in.

157 Patrolman Lloyd and possibly Patrolman Volmer were the officers who had arrested Linda and Donald Underhill on the night before. I believe there was a traffic violation against Donald Underhill. I believe with "a revoked license". I don't know whether or not he was charged with revoked driver's license or any other charge.

158 Q. Do you know who gave the orders to pick up Donald Underhill?

A. I believe Sgt. Stegle did.

Q. Do you know upon what charge or for what purpose?

A. The attempted forgery at the Union Bank.

Q. That was the reason he was to be picked up, is that correct?

A. Yes, sir.

ELMER THEIS, called as a witness on behalf of the People, having been first duly sworn, testified as follows:

*Direct Examination by Mr. Puklin.*

I am a Lieutenant of the Elgin Police Department, and I am acquainted with Donald and Linda Underhill who were in custody at the Department on January 17, 1966.

159 Q. Do you know the basis for this custody?

A. They were picked up and charged with investigation, deceptive practice.

Q. And both of them were charged with the same thing?

A. Yes, sir.

They were picked up on the 16th day of January, and I saw Donald Underhill on the 17th day of January in my office and on one other occasion. I believe he requested to see me, and I talked to him in the squad room. I really don't know what time of day it was; I was in and out of the office. He was being talked to by Sgt. Stegle and Officer Jensen.

160 I believe it was before noon. I did not take part in this conversation at all. I probably heard some, but I can't tell you what they were talking about. I didn't hear anyone make any promises or threats to Donald Underhill. I did not hear anybody say that they had nothing against Donald, but they could

prove that Linda was involved in a forgery, and if he would plead guilty, they would let her go. I believe it was in the afternoon when he requested to see me, and this was the second time I was in his presence. One of the officers, either Jensen or Stegle, was present at that time. Donald wanted to know if he could make a deal with me by making a buy or giving information against a subject for pornographic material or some type of dope; and if he and Linda would leave the State. I told him I was not in a position to give him consideration. I told him that it had never occurred that the Judge would let us decide whether a subject gets probation. I told him that as far as I was concerned I would oppose it if I were asked. And that as far as his wife, if the Judge asked, I couldn't oppose probation. There were
162 no promises that if he would cooperate with me I would go to bat for Linda. On January 17, I saw Linda Underhill at the Police Station. I never talked to her. I think Sgt. Stegle and Officer Jensen were with her at that time. They were talking at Stegel's desk, something about checks. To my knowledge no promises of leniency were given to Donald or Linda Underhill. There have not been any threats that if they didn't cooperate extra pressure would be put upon them. There was no discussion in my presence about Linda being sent to Dwight.

162 Q. At any time during your conversation with Donald Underhill, did he admit to you or in your presence a part in the burglary of the Manor Coffee Shop?

163 A. He told me in the squad room that he'd say—or tell everything if we'd go ahead on this whereby we'd set up somebody else on the purchase of drugs or the purchase of pornographic material. And he was not made any promises or deals.

*Cross Examination by Mr. McKenney.*

I don't know what time the conversation took place with Donald Underhill. I was not on this particular case. When he asked to see me I took either Jensen or Stegle with me. I don't remember which one.

164 Q. Okay; now, you say he was charged. With what was he charged?

A. Investigation of deceptive practice.

Q. And he was actually charged with that?

A. Yes, sir.

Q. When was he charged with that?

A. On the 16th of January, 1966.

Q. What time?

A. I don't have his booking slip here.

Q. Who signed the charge?

A. I don't know.

Q. Had you seen the charge before you saw him?

165 A. I saw it on the property envelope. I didn't see the actual lodging of the charge.

Q. Do you know who issued the order at the Police Department to pick him up?

A. I know that the office was checking on some checks that was stolen at a hospital and being cashed. And that is what the original pickup was on because his name was on one.

That was the deceptive practices I am talking about. If they saw him, they were to bring him in. I saw Linda Underhill being talked to by Sgt. Stegle. I was in and out of the office several times. I had no conversation with Linda.

166 *Redirect Examination by Mr. Puklin.*

Donald Underhill was under investigation originally for the checks, and then information was given to us that Linda worked at a place that was burglarized, and left the day after it was burglarized and the safe being found. I don't know whether Linda was charged with driving a motor vehicle with no sticker at the time of her arrest.

167 NORMAN SMITH, being first duly sworn, was examined and testified on behalf of the People as follows:

Mr. Puklin: If the Court please, it has been brought to my attention that Lt. Smith, unless he is out in the hall right now, was off duty and they were trying to locate him. And seeing that the jury has gone, I wonder if I could be permitted to call him tomorrow morning if I don't find him in the hall right now.

The Court: Get him right now.

I am a Lieutenant in the Police Department of Elgin, and I am acquainted with Donald Underhill, whom I saw on January 16, 1966, when two of our officers brought him into headquarters. I believe Officers Lloyd and Lundy were the two officers. I was

officer in charge at the time, and it was my duty to book persons brought in, and make arrangements to hold him.

168 Q. Was he booked at that time?

A. Yes, he was.

Q. What was the charge?

A. He booked at that time for—he had no operator's license, but he was booked for investigation of deceptive practice also.

Linda Underhill was with him at that time, and she was booked for investigation of deceptive practices. They were informed of the nature of the charge against them.

169 Q. At any time did either of these people ask to make a phone call?

A. I don't recall them specifically asking to make a phone call.

When I was through booking them they were locked up and held.

169 *Cross Examination by Mr. McKenney.*

Q. Lt. Smith, on the back of your folder you have, "No city vehicle tag." Was Linda Underhill charged with that?

A. No.

Q. Was there ever any discussion of charging her with that?

170 A. I believe there was some discussion with the officers that brought her in.

Q. She was driving the car and they were going to charge her with that?

A. Yes.

Q. Then, Lt. Smith, if she was driving the car and there was a discussion of charging her with driving with no valid driving city sticker, how did you charge Donald Underhill with driving with no valid driver's license?

A. Because the officer, when the car was stopped, seen him driving the car and then when they—before they stopped they saw them switch places.

Q. Now, you say he was charged with investigation relative to deceptive practices.

A. Yes.

Q. Both of them?

A. Both of them.

Q. Had there been a complaint signed and warrant issued?

A. No, there hadn't.

Q. Oh, there hadn't.

A. To my knowledge, there hadn't been.

Q. Under whose orders had they been picked up?

171 A. We had been alerted to look for them from Lt. Theis of the Detective Bureau.

Q. Lt. Theis. But there was no warrant, no complaint—

A. To my knowledge, there wasn't.

Q. —signed by anyone?

A. No.

*(Appendix)*

171 Counsel for the Defendant argues in support of the Motion to Suppress the Confessions.

175 Counsel for the People argues in opposition to the Motion to Suppress Confessions.

178 Counsel for Defendants reply to the Argument of Counsel for the People.

180 The Court: Motion denied.
Mr. McKenney: Okay.
The Court: Draw an Order.
Start at 10:00 o'clock tomorrow morning.

From Report of Proceedings at the trial:

250 I did nothing else at this time. On January 11, 1966, I went out on Spaulding Road three blocks east of Gifford Road with Sgt. Stegle, and found a safe in a ditch, on the north side of the road.

251 It was in four parts, People's Exhibit No. 3, when I first saw it at that location on Spaulding Road. We brought the safe to the Detective Bureau and later it was taken to the Crime Laboratory in Joliet. We kept it in the Detective Bureau in Elgin on a table. It was not taken off the table for anything other than to go to Joliet.

I saw Donald Underhill at 9 or 9:30 on the morning of January 17, 1966, at the Detective Bureau in Elgin.

253 Q. Who was present?
A. Sgt. Stegle, myself.
Q. Was anybody else present?
A. On occasion, Lt. Theis was.

*(Appendix)*

Sgt. Stegle asked Donald Underhill if he knew anything about the safe on the table. At first Donald Underhill said no, he knew nothing of it. Sgt. Stegle told him that he knew Linda had worked at this restaurant where the safe was missing after the burglary, and she never came back to work, and that he suspected Linda had something to do with it, and possibly obtaining a key. Donald Underhill said "I will tell you about the safe if you keep Linda out of it." Sgt. Stegle, Lieut. Theis and I were present when the conversation as to her getting probation came up. Lieut. Theis and I think Sgt. Stegle said we couldn't do this, although we would not oppose probation. We would go along with the recommendation of the State's Attorney's Office, the reason for this, she being directly involved in it. Sgt. Stegle asked him whether or not that was the safe that he had taken, and he said it was. We asked him where he had dumped it, and he said on Spaulding Road just off Gifford Road. He wasn't sure of the name of this road. We went to his home where he had broken the safe open in the basement. He had stated that there was approximately $240-$250 in cash in the safe, and some checks. He said he had burned the checks in a large ashtray. We asked where he had pried the safe open, and he said in the basement of his home at 359 May Street. We asked him if he would take us down there and show us where and how, and he said he would. At his home he took us to the basement and showed us on the floor a white chalky substance and stated he had tried to wash

it down. This is where he had pried the safe open. He said it was from the lining of the safe. He went to a work bench and picked up a crowbar and gave it to me.

People's Exhibit 4 I know to be the same bar by the tag that was put on there by Sgt. Stegle and my-
257 self at that time. We took the bar, and then Donald and Sgt. Stegle and myself went over the bypass bridge, Route 20 in Elgin which crosses the Fox River, and he showed us where he threw a small cash box taken out of the safe. We never retrieved the cash box.

We then went to the post office garage when Donald Underhill's car was in storage and from the trunk of it, he gave us two screwdrivers, which he also used to pry the safe open. We brought those to Police Headquarters also. Those are People's Exhibits 5 and 6. I know that they are the same that Donald gave us because of the tag we put on them. We asked Donald Underhill if he would like to give us a written statement as to the burglary.

258 He stated that he would like to call his attorney first. He called an attorney, John McNerney, and from the conversation there was no answer or he wasn't in. People's Group Exhibit 3 and Exhibits 4, 5 and 6 have been kept in the Elgin Detective Bureau and also in the Illinois Crime Laboratory. They were kept on a table in our Detective Bureau. I went with Officer Stegle when he took these items to Joliet.

*(Appendix)*

I was not with him when he picked them up. Prior to noon of that same day in the Detective Bureau, I had a conversation with Linda Underhill. Sgt. Stegle asked questions of Linda, and he asked her what part she had in this burglary. First she denied it. Sgt. Stegle stated that Donald had given us the key to the restaurant which he used to gain entrance. Then she admitted to Stegle and myself that Donald had asked her to get the key for the back door, which she had done. And after Donald making a duplicate, she had returned the key where she had gotten it. There was no other conversation pertaining to the burglary.

*Cross Examination by Mr. McKenney.*

I accompanied Sgt. Stegle to a Ben Franklin Store and another store to see if a duplicate key had been made up to the premises of the Manor Coffee Shop.

Q. Do you recall on March the 29th, 1966, roughly five weeks ago, at a preliminary hearing of this matter being asked the question: (Reading)

"Q. Please relate the conversation between yourself and Linda Underhill that took place on January the 17th in the Detective Bureau."

And do you recall giving this answer:

"A. We—I told Donald Underhill I thought his wife had gotten a key while working there and this key was used in the burglary to gain access to the building. A few minutes later he said, 'Yes, I asked Linda to get a key for me which I had made, at the Elgin Key and Lock, a duplicate of.'"

*(Appendix)*

Do you remember that?

A. Yes, sir.

Q. Did you investigate at the Elgin Key and Lock?

A. Not at that time, no, sir.

The discussion concerning probation for Linda was that he would tell us all about it if we could keep Linda out of it. I am sure that Sgt. Stegle was there when this discussion took place.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 8 1968
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1967

NO. 1142

DONALD F. UNDERHILL,

*Petitioner,*

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

*Respondent.*

(Petition for Writ of Certiorari To the Supreme Court of Illinois.)

## RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Room 900,
Chicago, Illinois 60601 (346-2000),
*Counsel for Respondent.*

JOHN J. O'TOOLE,
Assistant Attorney General,
*Of Counsel.*

# INDEX


PAGE

Opinion Below ..... 1

Jurisdiction ..... 1

Questions Presented ..... 2

Constitutional and Statutory Provisions ..... 2

Statement of the Facts ..... 2

Argument:

I. The courts of the State of Illinois were not required by the Constitution of the United States to declare petitioner's confession inadmissible per se for failure to take him before the nearest judge without unnecessary delay ..... 3

II. A promise of leniency does not render a confession inadmissible per se but rather should be a factor considered as an element under the totality of circumstances doctrine ..... 6


CITATION OF AUTHORITIES.


*Haynes* v. *Washington*, 373 U.S. 503 ..... 4, 6, 7

*Mallory* v. *United States*, 354 U.S. 449 ..... 4

*Mapp* v. *Ohio*, 367 U.S. 643 ..... 5

*McNabb* v. *United States*, 318 U.S. 332 ..... 4

*People* v. *Carter*, 39 Ill. 2nd 31, 39 ..... 4

*People* v. *Hall*, 413 Ill. 615 ..... 4

*People* v. *Hartgraves*, 31 Ill. 2nd 375, 379 ..... 4, 7

## QUESTIONS PRESENTED

1) Whether the "McNabb-Mallory Rule", excluding any confession made while illegally detained, should be applied to the states under the Fourteenth Amendment to the Constitution of the United States?

2) Whether any promise of leniency renders a confession inadmissible *per se*?

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions are adequately set forth in the Petition (Pet. 3-5).

## STATEMENT OF THE FACTS

Petitioner has adequately set forth the facts pertinent to the cause (Pet. 6-16).

## ARGUMENT

### I.

### THE COURTS OF THE STATE OF ILLINOIS WERE NOT REQUIRED BY THE CONSTITUTION OF THE UNITED STATES TO DECLARE PETITIONER'S CONFESSION INADMISSIBLE PER SE FOR FAILURE TO TAKE HIM BEFORE THE NEAREST JUDGE WITHOUT UNNECESSARY DELAY.

Section 109-1 of the Code of Criminal Procedure (Ill. Rev. Stat. 1965, ch. 38, par. 109-1) provides:

> Persons Arrested.
>
> (a) A person arrested without a warrant shall be taken without unnecessary delay before the nearest and most accessible judge in that county, and a charge shall be filed. A person arrested on a warrant shall be taken without unnecessary delay before the judge who issued the warrant or if he is absent or unable to act before the nearest or most accessible judge in the same county.
>
> (b) The judge shall:
>
> (1) Inform the defendant of the charge against him and shall provide him with a copy of the charge.
>
> (2) Advise the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code.
>
> (3) Hold a preliminary hearing in those cases where the judge is without jurisdiction to try the offense; and
>
> (4) Admit the defendant to bail in accordance with the provisions of Article 110 of this Code.

The Supreme Court of the State of Illinois has interpreted the aforementioned statute to the effect that a violation thereof does not *per se* void a confession but rather that said fact is only another factor to be considered by the trial judge on the question of the voluntariness of a confession. *People* v. *Carter,* 39 Ill. 2nd 31, 39; *People* v. *Taylor,* 33 Ill. 2nd 417, 422; *People* v. *Hall,* 413 Ill. 615.

The rationale of the interpretation and application of Section 109-1, by the Supreme Court of the State of Illinois, can be understood and appreciated when considered in the light of the "Totality of Circumstances Doctrine" propounded by this Court in *Haynes* v. *Washington,* 373 U.S. 503, and which is followed in this state. (*People* v. *Hartgraves,* 31 Ill. 2nd 375, 379). The "Totality of Circumstances Doctrine" in effect requires that the attendant factors surrounding a confession must be examined in view to their cumulative impact on an accused to determine if in fact the confession is a product of the free will or a product of psychological coercion.

In *McNabb* v. *United States,* 318 U.S. 332 and *Mallory* v. *United States,* 354 U.S. 449, this Court held that Rule 5(a) of the Federal Rules of Criminal Procedure (Pet. 5), which is similar to Section 109-1, required that a confession which was obtained in violation thereof was *per se* inadmissible.

The petitioner admits that the federal exclusionary rule is predicated upon an interpretation of Rule 5(a) rather than upon a violation of the Constitution of the United States (Pet. 19-21) but urges that said principle should be extended to the states under the Fourteenth Amendment to the Constitution (Pet. 21-24).

In an effort to lend support to his contention, the petitioner attempts to equate the situation presented to this

Court in *Mapp* v. *Ohio,* 367 U.S. 643, to the case at bar (Pet. 21-22). In the *Mapp* case, this Court had previously held that it is a violation of the Fourth Amendment to the Constitution to use evidence secured through an illegal search and seizure (*Weeks* v. *United States,* 232 U.S. 383). In *Mapp,* this constitutional violation was extended to the states under the Fourteenth Amendment.

There is a basic difference between the situation presented in *Mapp* and that presented here. In *Mapp* this Court was confronted with a procedure which as applied to the federal authorities was a violation of the Fourth Amendment to the Constitution. The question presented was therefore whether the same violation should be applicable to the states under the Fourteenth Amendment. This Court held that it was necessarily and properly encompassed therein. Here, however, an entirely different question is presented for neither a constitutional violation applicable to the federal authorities, nor the evil to be remedied are present.

Specifically there are two reasons why the "McNabb-Mallory Rule" should not be applied to the states. In the first instance it would require that this Court extend a Federal Rule of Procedure to the states under the Fourteenth Amendment when it has not declared that such a procedure is a violation of any of the first ten Amendments to the Constitution.

Secondly, and perhaps more important, is the question of the evil to be remedied. In *Mapp* v. *Ohio,* 367 U.S. 643, the Constitution prohibited the use of evidence obtained by illegal means in federal prosecutions, while the states were permitted to utilize such evidence. If the federal exclusionary rule was not extended to the states under the Fourteenth Amendment a citizen could legally be confronted with evidence illegally obtained. The ultimate

question was either the total admissibility or inadmissibility of illegally seized evidence; there was no middle ground.

The question presented here is unlike *Mapp,* for it is not whether a factual situation is to be ignored but rather in what manner it is to be considered.

The states are required to consider all facts which are relevant to the utterance of a confession in order to determine its validity under the "Totality of Circumstances Doctrine" under *Haynes* v. *Washington,* 373 U.S. 503, including the failure to take an accused before the nearest judge without unreasonable delay. Because the State of Illinois, or any other state, has not adopted the federal interpretation of a federal rule on the issue should not be determinative. Rather the salient element should be whether a state considers the issue to be an important question in determining the ultimate validity of a confession. This the State of Illinois has done.

The respondent submits that the courts of the State of Illinois were not and should not be required to consider the failure to take an accused before a judge without unreasonable delay as a *per se* violation of the Fourteenth Amendment to the Constitution of the United States, so long as they consider the fact as an element under the "Totality of Circumstances Doctrine".

## II.

## A PROMISE OF LENIENCY DOES NOT RENDER A CONFESSION INADMISSIBLE PER SE BUT RATHER SHOULD BE A FACTOR CONSIDERED AS AN ELEMENT UNDER THE TOTALITY OF CIRCUMSTANCES DOCTRINE.

The petitioner urges that his conviction should be reversed because his confession and that of his wife was

given only after the police had promised that his wife would receive probation if they confessed (Pet. 25-33). He contends that any offer of leniency prior to a confession renders the confession inadmissible *per se* and has cited several cases which he has interpreted to enunciate this principle (Pet. 28-32).

The authorities cited by the petitioner do not support the conclusion but rather collectively present the view that psychological coercion is equally as reprehensible as physical coercion.

In Point I of this Response, the respondent established that the State of Illinois, in following the "Totality of Circumstances Doctrine" as set forth by this Court in *Haynes* v. *Washington,* 373 U.S. 503, considers all facts which are relevant to the utterance of a confession in order to determine its validity. *People* v. *Hartgraves,* 31 Ill. 2nd 375, 379.

Rather than applying the conclusive label of *per se* to any promise or suggestion of leniency, reason requires that a state examine the fact in light of the totality of the circumstances because of ambit necessarily encompassed within the generic term of "promise of leniency".

In the case at bar, the promise of leniency of which the petitioner makes reference consisted of a request by the petitioner to keep his wife out of it and a reply on behalf of the police that they would not oppose probation (Pet. 10, 15). Surely, this fact taken alone should not be equated to a *per se* constitutional violation.

In applying the doctrine of "Totality of Circumstances" to the case at bar, the petitioner sets forth two factors which should be considered: (1) incommunicado detention in violation of Section 109.1 of the Code of Criminal

Procedure and (2) a promise of leniency for wife (Pet. 26-27).

In relation to the first factor, the respondent was not promptly presented to a judge but the testimony indicates that the petitioner was permitted to telephone a lawyer but was unable to reach him (Pet. 10). In relation to the question of promise of leniency, the Supreme Court of Illinois properly found that the evidence was conflicting and the police merely informed petitioner that they would not oppose probation but that it was not their prerogative to grant it (Pet. 9a).

It is submitted that the relatively short period of detention prior to confession and the mild inducement of leniency cannot be equated to such psychological coercion as to render the confession inadmissible.

## CONCLUSION

In view of the foregoing the State of Illinois, respondent, respectfully submits that the petition for certiorari to the Supreme Court of Illinois should be denied.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle Street, Room 900,
Chicago, Illinois 60601 (346-2000),
*Counsel for Respondent.*

JOHN J. O'TOOLE,
Assistant Attorney General,
*Of Counsel.*